

COVID-19 – National Cabinet approves a mandatory code of conduct for commercial tenancies

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Source: [Prime Minister of Australia](#)

The National Cabinet has agreed that the states and territories will implement a mandatory code of conduct to govern commercial tenancies affected by the COVID-19 pandemic (**Code of Conduct**) based on the set of principles agreed by the National Cabinet on 3 April 2020 (see our [legal update](#) on 7 April 2020).

What is the purpose of the Code of Conduct?

The Code of Conduct is being put in place to assist all commercial tenancies (including all retail, office and industrial tenancies) suffering financial stress or hardship as a direct result of the COVID-19 pandemic (including the government-mandated trading restrictions). It imposes a set of good faith leasing principles on commercial landlords and tenants in negotiating amendments to existing leasing arrangements.

Who will the Code of Conduct apply to?

The Code of Conduct will apply to those commercial tenancies where the tenant:

- is a small-medium sized business;
- has an annual turnover of up to \$50 million; and
- is an eligible business for the purpose of the federal government's [JobKeeper program](#) (e.g. the business has incurred a drop of at least 30% in revenue).

How will the Code of Conduct be implemented?

The Code of Conduct will be implemented through the relevant state and territory legislation or regulation, as appropriate. The Code of Conduct will not supersede the existing legislation but will complement it during the COVID-19 pandemic period.

What are the overarching principles of the Code of Conduct?

In negotiating appropriate amendments to existing leasing arrangements under the Code of Conduct, the following overarching principles will apply to landlords and tenants:

- **Work together** to ensure that businesses can continue and normal trading activities can be resumed at the end of the COVID-19 pandemic period.

- Work towards achieving **mutually satisfactory outcomes**.
- Negotiate and agree **in good faith**.
- Act in an **open and honest manner** and provide sufficient and accurate information (including information from accounting systems or from financial institutions) to achieve outcomes.
- Agree arrangements (e.g. rent reductions) which are **proportionate and appropriate** to the financial impact of the COVID-19 pandemic on the tenant during the COVID-19 pandemic period and a (reasonable) subsequent recovery period.
- Assist each other to achieve outcomes in **dealing with other stakeholders** such as governments, utility companies and financial institutions.
- All commercial arrangements and the **circumstances of each party are different**. It is not possible to create one approach that would apply to all arrangements and circumstances.
- A landlord cannot seek to permanently **mitigate a landlord's risk** under a commercial lease.
- All leases should be considered on a **case-by-case basis**, e.g. if a tenant has suffered financial hardship due to the COVID-19 pandemic, if the rent is already in arrears or if the lease has expired or is about to expire.
- Consider the existing **lease terms**, e.g. the existing mechanisms for determining the rent.
- Consider if the tenant is in **administration or receivership**.

What leasing principles will be applied under the Code of Conduct?

In negotiating appropriate amendments to existing leasing arrangements under the Code of Conduct, the following leasing principles must be applied by landlords and tenants:

- **No termination of leases for non-payment of rent:** a landlord should not terminate a lease for non-payment of rent during the COVID-19 pandemic period or during the (reasonable) subsequent recovery period.
- **Continued non-compliance by tenants will forfeit protection:** a tenant who fails to comply with the substantive terms of the lease (subject to any agreed amendments) will forfeit any protections provided under the Code of Conduct.
- **Landlords must offer proportionate rent reductions:** a landlord must offer to a tenant a rent reduction of up to 100% of the amount normally payable, by way of a waiver or a deferral, proportionate to the reduction in the tenant's trade during the COVID-19 pandemic period and a (reasonable) subsequent

recovery period. A landlord cannot recoup any waived amount over the term of the lease.

- **Rent waivers must constitute at least 50% of rent reductions:** a rent waiver must constitute at least 50% of the total rent reduction over the COVID-19 pandemic period. Tenants can agree to waive this minimum 50% rent waiver.
- **Rent deferrals must be amortised:** the payment of a rent deferral by a tenant must be amortised over the balance of the lease term and a period of at least 24 months (whichever is the greater), unless otherwise agreed by the parties.
- **Landlords must pass on the benefit of a reduction in statutory charges or insurance costs:** a landlord must pass on to a tenant the proportionate benefit of any reduction in statutory charges (e.g. land tax or council rates) or insurance costs.
- **Landlords must pass on the benefit of loan payment deferrals:** a landlord must pass on to a tenant the proportionate amount of any benefit received by a landlord as the result of the deferral of loan payments by a financial institution, e.g. under the [Australian Banking Association's COVID-19 relief scheme](#).
- **Landlords must not seek to recover other expenses:** a landlord must not, where appropriate, seek to recover any other expenses or outgoings payable by a tenant under a lease during the period that the tenant is unable to trade. A landlord reserves the right to reduce services in such circumstances.
- **Repayments to be over an extended period:** any agreed repayments should only happen over an extended period of time (to avoid placing any undue financial burden on the tenant and compromising the ability of the tenant to recover from the crisis) and should not commence until the earlier of the ending of COVID-19 pandemic (as defined by the Australian Government) or the expiry of the existing lease, taking into account a (reasonable) subsequent recovery period.
- **No fees, charges or interest on rent waivers or deferrals:** a landlord must not apply any fees, charges or interest in respect of any rent waived or deferred.
- **No drawing on tenants' securities:** a landlord must not draw on a tenant's security (e.g. a cash bond, a bank guarantee or a personal guarantee) for non-payment of rent during the COVID-19 pandemic period and a (reasonable) subsequent recovery period.
- **Landlords must offer lease extensions:** a landlord must offer a lease extension to a tenant for a period equivalent to any rent waiver or rent deferral period. This principle provides tenants with additional time to trade on existing

lease terms after the end of the COVID-19 pandemic period and during the recovery period.

- **No rent increases:** except for retail leases which are based on turnover rent, a landlord must put a freeze on any rent increases for the duration of the COVID-19 pandemic and a (reasonable) subsequent recovery period.
- **No penalties for reducing or ceasing trading:** a landlord cannot take any action if a tenant reduces its opening hours or ceases to trade due to the COVID-19 pandemic.

What if a landlord and a tenant cannot reach agreement?

If a landlord and a tenant cannot reach agreement on appropriate amendments to existing leasing arrangements as a direct result of the COVID-19 pandemic, the matter should be referred for binding mediation to the applicable state or territory retail/commercial leasing dispute resolution body. For example:

NSW: [Small Business Commissioner](#)

VIC: [Small Business Commission](#)

QLD: [Queensland Civil and Administrative Tribunal](#)

SA: [Small Business Commissioner](#)

WA: [Small Business Commissioner](#)

TAS: [Consumer, Building and Occupational Services](#)

NT: [Commissioner of Business Tenancies](#)

ACT: [ACT Magistrates Court](#)

The mediation process should not be used by landlords or tenants to prolong or frustrate the achievement of amicable outcomes.

When does the Code of Conduct come into effect?

The Code of Conduct comes into effect in all states and territories from a date (after 3 April 2020) to be decided by each jurisdiction and will remain in effect for the period during which the [JobKeeper program](#) remains operational.

Key takeaways

During the COVID-19 pandemic period and the (reasonable) subsequent recovery period, a landlord of a commercial tenancy covered by the Code of Conduct **must**:

- offer a rent reduction to a tenant proportionate to the reduction in the tenant's trade, by way of a rent waiver or deferral (unless otherwise agreed by the tenant);
- pass on the benefit of any loan payment deferral or reduction in statutory charges/ insurance costs;
- put a freeze on any rent increases;
- ensure that any agreed repayments should only happen over an extended period after the ending of the COVID-19 pandemic or the expiry of the lease (whichever is the earliest); and

- offer lease extensions equivalent to any rent waiver or deferral periods,

but such a landlord **must not**:

- terminate a lease for non-payment of rent;
- seek to recover any other expenses or outgoings payable under a lease;
- apply any fees, charges or interest in respect of any waived or deferred rent;
- draw on a tenant's security for non-payment of rent; or
- take any action if a tenant reduces its opening hours or ceases to trade.

The Code of Conduct should be implemented shortly in each jurisdiction through the relevant state or territory legislation or regulation.

For those commercial tenancies not covered by the Code of Conduct, they will unfortunately have to try and negotiate amendments to existing lease arrangements without either party being required to comply with any code of conduct or good faith leasing principles.

For more information, see the [Prime Minister's website](#).