

COVID-19: the NT's implementation of the national code for commercial tenancies

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Source: [Northern Territory Legislation](#)

Abstract:

The Prime Minister announced 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. The purpose of the state and territory legislation or regulation is to modify, during the COVID-19 pandemic, 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 who are 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](#).

Implementation of the National Code in the Northern Territory

The *Tenancies Legislation Amendment Act 2020* (NT)(**Act**) commenced in the Northern Territory on 25 April 2020, amending the *Business Tenancies (Fair Dealings) Act 2003* (NT)(“**BT Act**”) and empowering the Minister for Justice to make modification notices suspending or modifying the BT Act or regulating:

- business leases (as defined in the BT Act (“**business leases**”)); or
- occupation arrangements for business purposes to which, but for the Act, the BT Act does not apply (“**occupation arrangements**”).

On 28 April 2020, the Minister for Justice made such a modification notice, the [Business Tenancies COVID-10 Modification Notice 2020 \(Modification Notice\)](#).

When do the BT Act amendments and the Modification Notice apply?

The BT Act amendments and the Modification Notice apply during the “emergency period”, which is the period during which a COVID-19 public health emergency is declared in the Northern Territory under section 48 of the *Public and Environmental Health Act 2011* (NT) (“**emergency period**”). A COVID-19 public health emergency was [declared](#) under section 48 on 18 March 2020 and was most recently [extended](#), on 22 June 2020, until 24 September 2020.

Who do the BT Act amendments and the Modification Notice apply to?

The BT Act amendments and the Modification Notice apply to business leases and occupation arrangements.

What are the effects of BT Act amendments and the Modification Notice?

The BT Act amendments and the Modification Notice provide as follows:

Landlord's legal costs not recoverable for proceedings commenced during emergency period

Under section 140 of the *Law of Property Act 2000* (NT), a landlord is entitled to recover from a tenant all reasonable costs and expenses properly incurred by the landlord in respect of a breach by the tenant giving rise to a right of re-entry or forfeiture; however, a landlord cannot recover any legal costs if the proceedings commence during the emergency period and, in the case of an occupation arrangement, if the breach occurred after 25 April 2020.

Termination notices extended

The time for giving a termination notice under Part 8, Division 5 of the *Law of Property Act 2000* (NT) is extended by 30 business days if:

- it relates to a business lease which is for a period of 3 months or more; and
- it is during the emergency period and the landlord is required to make good faith efforts to negotiate with the tenant to allow the tenant to remain in the premises before giving a notice to quit (see below).

Tenants holding over not required to pay double market rent

Section 152 of the *Law of Property Act 2000* (NT) (which requires holding over tenants to pay double rent) does not apply to a business lease that ends during the emergency period unless, as at 25 April 2020, a demand has been made and notice has been given in writing for delivery of possession of the premises or the tenant has given a notice of intention to quit the premises.

Jurisdiction of courts to hear and determine retail tenancy claims

The Local Court has jurisdiction to hear and determine retail tenancy claims in respect of any disputed matter (the jurisdictional limit being \$250,000). The Supreme Court has jurisdiction to hear and determine retail tenancy claims that relate to a monetary amount exceeding \$200 000.

Repossession of business premises – alternative dispute resolution at NTCAT

If, during the emergency period, an application is made to the Local Court for a warrant of possession of a business premises (as defined in the BT Act):

- unless exceptional circumstances exist, the Local Court must, before hearing and determining the application, refer the matter to the Northern Territory Civil and Administrative Tribunal (NTCAT) for alternative dispute resolution;
- the Local Court may alternatively allow for mediation or conciliation if satisfied that the parties would prefer to arrange their own mediation or conciliation without involving NTCAT and that such a course is appropriate;
- NTCAT must notify the Local Court if the parties agree to a settlement; and
- NTCAT must advise the Local Court that a resolution has not been achieved if satisfied that the applicant has participated in good faith in alternative dispute resolution but that a settlement could not be reached or a settlement is not reached within 60 days.

Warrant of possession application costs during the emergency period

The parties to a warrant of possession application (under section 131 of the BT Act) made during the emergency period are liable for their own costs; however, the Local Court may make a costs order

against a party. This also applies to proceedings that commence during the emergency period but which are not completed before the end of the emergency period.

Mandatory negotiation during the emergency period

During the emergency period, a landlord cannot give a tenant a notice to quit unless the landlord has, for a period of at least 30 business days, made good faith efforts to negotiate with the tenant to allow the tenant to remain in the premises. This does not apply if:

- the notice to quit given under section 126 of the BT Act (where the business premises is a drug premises as defined in section 11A of the *Misuse of Drugs Act 1990*); or
- the notice to quit given in the reasonable belief that the tenant engaged in or intends to engage in illegal conduct on the premises or conduct that caused or will cause substantial damage to the premises.

If a business lease requires negotiations or an alternative dispute resolution process before a notice to quit can be given, those requirements continue to have effect and the minimum 30 day negotiation period must run concurrently with the period for the negotiations or the alternative dispute resolution process.

Misrepresentation and unauthorised disclosure of information in negotiations during the emergency period

A person commits an offence if the person is a party to negotiations between a landlord and a tenant or is acting on behalf of such a party and the person intentionally or recklessly:

- misrepresents the financial situation of the party during the negotiations; or
- discloses (during or after the emergency period) information about the other party's financial situation that was obtained during the negotiations (subject to certain exceptions – see s132G(2) of the Act).

Summary of the key measures applying during the emergency period

- **Landlords must negotiate:** a landlord cannot give a notice to quit unless the landlord has, for a period of at least 30 business days, made good faith efforts to negotiate with the tenant to allow the tenant to remain in the premises.
- **Offence to misrepresent or disclosure information:** a party who intentionally or recklessly misrepresents the financial situation of another party during negotiations or who discloses information about another party's financial situation is guilty of an offence.
- **Legal costs not recoverable by landlord:** a landlord cannot recover its legal costs for proceedings commenced during the emergency period in respect of a breach giving rise to a right or re-entry or forfeiture.
- **No double rent for holding over tenants:** a tenant holding over is not required to pay double market rent if the lease ends during the emergency period.
- **Alternative dispute resolution:** if an application is made to the Local Court for a warrant of possession of a business premises, the Local Court must, before hearing the application, refer the matter to NTCAT for alternative dispute resolution or, alternatively, may allow for mediation or conciliation if it deems it appropriate.
- **Parties to possession application liable for their own costs:** the parties to a warrant of possession application during the emergency period are liable for their own costs unless the court orders otherwise.

Do the temporary measures give full effect to the National Code?

The Modification Notice does require landlords to made good faith efforts to negotiate with tenants for at least 30 business days to allow tenants to remain in their premises before giving a tenant a notice

to quit and, in this regard, the parties could consider the leasing principles in the National Code while negotiating temporary amendments to their leasing arrangements; however, the Modification Notice and the BT Act amendments do not expressly incorporate all of the key leasing principles in the National Code. For example, they do not expressly:

- prohibit landlords from terminating leases for non-payment of rent;
- require landlords to offer tenants rent reductions, by way of waivers and deferrals, proportionate to the reduction in the tenants' trade;
- require landlords to offer lease extensions to tenants for periods equivalent to rent waiver and deferral periods;
- prohibit landlords from applying any charges or interest on waived or deferred rent;
- prohibit rent increases;
- require landlords to pass on the benefit of statutory charges or insurance costs reductions;
- require landlords to share the benefit of loan payment deferrals;
- prohibit landlords from seeking to recover any expenses payable by tenants during periods that tenants are unable to trade;
- prohibit landlords from taking any action if tenants reduce their opening hours or cease to trade due to the COVID-19 pandemic; or
- prohibit landlords from drawing on tenants' securities for non-payment of rent.

Further, unlike the National Code, the Modification Notice and the BT Act amendments are not restricted to 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 under the [JobKeeper program](#),

But these turnover/eligibility requirements do apply to applicants seeking support under the business hardship package (see below).

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

What is the business hardship package?

The business hardship package was introduced to provide support to businesses in the Northern Territory that have experienced significant hardship as a result of the COVID-19 pandemic. It is available for a period of 6 months, from **1 April 2020 to 30 September 2020**.

Eligible businesses may be able to apply for:

- a waiver or deferral of the payment of payroll tax;
- a waiver or deferral of the payment of council rates; or
- a reduction of up to 50 % in utilities (e.g. electricity, water, sewerage, etc).

To be eligible, a business must have a turnover of less than \$50 million and be able to demonstrate that it has suffered a reduction in turnover of 30% or more due to COVID-19. Evidence can be in the form of audited financial statements, internal accounting system reports, reports prepared by a bookkeeper/accountant or BAS statements.

Commercial landlords may be eligible for support if they can also provide evidence that they have negotiated in good faith with their tenants to provide rent relief in accordance with the National Code.

What should landlords and tenants in the NT do?

During the emergency period, a landlord must make good faith efforts to negotiate with a tenant to allow the tenant to remain in their premises before giving any notice to quit. A landlord must also

evidence that it has negotiated in good faith with a tenant to provide rent relief in accordance with the National Code if it wishes to apply for support under the business support package, Accordingly, a tenant who is suffering financial hardship as a result of the COVID-19 pandemic should seek to negotiate rent or other relief from the landlord (if it has not already done so). The parties should do the following:

Step 1

- Confirm if their business lease or other occupancy arrangement is covered by the BT Act amendments and the Modification Notice.
- Carefully review the BT Act (as amended), the Modification Notice and the National Code to determine their rights and obligations.
- Determine if they will be able to eligible for support under the business hardship package.

Step 2

- Communicate and commence negotiations with each other as soon as possible (if they have not already done so), having regard to each other's individual circumstances, including financial hardship.
- Provide each other with information that is accurate and sufficient to evidence each other's financial circumstances and to enable negotiations to occur and agreement to be reached.
- If eligible, apply for support under the business hardship package. Landlords will not be eligible for support unless they can evidence that they have negotiated in good faith with their tenants to provide rent relief in accordance with the National Code.
- Consider if FIRB approval is required for any lease variation or extension (if the tenant is a foreign person). See our update on 30 April 2020 [COVID-19 — FIRB provides guidance on how the temporary measures will affect lease transactions.](#)

Step 3

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

What about leases not covered by the BT Act amendments and the Modification Notice?

Parties under leases not covered by the BT Act amendments and the Modification Notice 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 BT Act amendments and the Modification Notice do not apply to these leases. The parties are not bound by them and cannot benefit from their protection.

Further resources and guidance:

The [Consumer Affairs Northern Territory website](#) provides further helpful information to assist landlords and tenants, including the following:

- [COVID-19 Tenancy Amendments overview](#)
- [Commercial leases affected by COVID-19](#)

For further details on the business hardship package and on how to apply for support under this package, see the Northern Territory's [Business Recovery website](#).