

Briefing paper: Mandatory Code of Conduct for commercial tenancies (Code)

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1. Summary

- 1.1 The Mandatory Code of Conduct for commercial tenancies was released on 7 April 2020.
- 1.2 The Code aims to impose a set of good faith leasing principles for negotiations between tenants that are suffering financial stress as a result of the Coronavirus (COVID-19) pandemic and their landlord, to guide them when negotiating temporary measures relating to payment of rent and other costs.
- 1.3 The Code will be legislated and regulated by each State and Territory.
- 1.4 The Northern Territory Government has not released legislation addressing the Code (as at 9 April 2020).
- 1.5 Once enacted, it is intended that the Code will be mandatory and provide for a range of rent relief measures for commercial, industrial and retail tenants.
- 1.6 The Code can be found at <https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>.

2. Code's objective

- 2.1 The Code's objective is to share the financial risk and cashflow impact during the COVID-19 **pandemic period** (defined as the period during which the JobKeeper programme is operational) in a measured way that appropriately balances the interests of landlords and tenants.
- 2.2 The Code aims to reinforce the Commonwealth Government's recent calls for landlords and tenants to engage in genuine negotiations in order to reach agreement to alleviate any financial stress and hardship being experienced by tenants as a result of the COVID-19 downturn and government measures.

3. Eligible tenants

- 3.1 The Code applies only to tenants that fall within the definition of "**SME tenants**" in the Code.

3.2 SME tenants are defined in the Code as:

- (a) tenants with an annual turnover of less than \$50 million (**Turnover Test**); and
- (b) tenants that are eligible for the Commonwealth Government's JobKeeper programme (**JobKeeper Test**).

3.3 **Turnover Test**

- (a) The annual turnover threshold of \$50 million applies at a group level for tenants who are retail corporate groups (rather than an individual retail outlet level).
- (b) As such some retail corporate groups will not be able to access the protections offered by the Code.

3.4 **JobKeeper Test**

Below is extracted from the [Australian Taxation Office's](#) (ATO) information relating to employers eligible for the JobKeeper payment:

- (a) To be eligible for the JobKeeper programme, a business will need to show its turnover has fallen by more than 30% as a result of the outbreak of COVID-19.
- (b) To establish that a business has faced a more than 30% fall in their turnover, most businesses are expected to establish that their turnover has fallen in the relevant month or three months (depending on the natural activity statement reporting period of that business) relative to their turnover a year earlier.
- (c) If the fall in turnover is not greater than 30% then the Tax Commissioner will have discretion to consider additional information that the business can provide to establish that they have been significantly affected by the impacts of COVID-19.

4. Overarching principles

4.1 Below is a summary of the key "overarching" principles of the Code:

- (a) **Common interest:** Landlords and tenants have a common interest in working together.
- (b) **Must negotiate:** A requirement to negotiate.
- (c) **Good faith:** Must negotiate in good faith and in an open and transparent manner.
- (d) **Accurate information:** Must provide sufficient and accurate information.
- (e) **Case by case:** All commercial arrangements are different and it is expected that landlords will agree to tailored, bespoke and appropriate temporary arrangements.

- (f) **Proportionate:** Temporary arrangements are to be proportionate having regard to impact on tenant's revenue, expenses and profitability (during pandemic and reasonable recovery period).
- (g) **Risk of default:** Risk of default is always with the landlord and landlord's must not seek to permanently mitigate that risk.

5. Leasing principles

- 5.1 The Code mandates leasing principles that are to apply on a case by case basis.
- 5.2 The leasing principles are to be applied by landlords and tenants whilst negotiating "appropriate temporary arrangements" under the Code.
- 5.3 The leasing principles of the Code are as follows:

- (a) **No termination:** Landlords must not terminate leases for non-payment of rent.
- (b) **Lease compliance:** Tenants must continue to comply with their lease obligations otherwise tenants will jeopardise the protections provided by the Code.
- (c) **Rent reductions:** Landlords must offer tenants proportionate reduction in rent in the form of **waivers** of rent and **deferrals** of rent based on the reduction in the tenant's trade (i.e. if turnover is down 60% then the rent reduction must be at least 60%).

Rent reduction can be 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 pandemic period and a reasonable recovery period.

- (i) **Waiver** of rent – is a permanent waiver of rent for an agreed period of time.
- (ii) **Deferral** of rent – is an agreement to defer rent, which deferred rent will be payable at a later time.

Care needs to be taken when referring to **waiver** and **deferral**.

- (d) **Waiver** of rent: Must constitute at least 50% of the **total rent reduction** (unless tenants waive that requirement). Waived rent is not able to be recovered by the landlord at any time.
- (e) **Deferral** of rent: Payment of deferred rent must be amortised over the balance of the term of the lease and 24 months, whichever is greater (unless otherwise agreed).
- (f) **Landlords to pass on benefits:** The landlord must pass on any reduction it received in statutory charges (e.g. land tax, council rates).

- (g) **Outgoings:** Landlords "should where appropriate seek" to waive recovery of any other lease expense "during the period the tenant is **not able to trade**".
- (h) **No penalty:** The Landlord must not charge fees or interest on rent or payments being deferred.
- (i) **No draw on security:** Landlords must not draw on a tenant's security (bond, bank guarantee or personal guarantee).
- (j) **Term extensions:** Landlords should offer to extend the lease for a period not less than the period of rent waiver and/or rent deferral.
- (k) **Rent freeze:** Landlords to freeze rent increases (other than turnover rent in retail leases) for the duration of the COVID-19 pandemic period and a reasonable recovery period after it passes.

6. If no agreement is reached

- 6.1 If landlords and tenants cannot reach an agreement on leasing arrangements, the Code will allow the dispute to be referred to the applicable state or territory leasing dispute resolution process for binding mediation.

7. I am a landlord – what should I do?

- 7.1 Landlords should wait to the details in the Northern Territory legislation before reaching any agreement with their tenant(s).
- 7.2 In the meantime, landlords may wish to consider taking the below steps:
 - (a) Consider whether the Code may apply to your tenant(s).
 - (b) Defer any tenancy enforcement due to unpaid rent.
 - (c) Consider how rental relief will affect your ability to fund any loan(s) you may have.
 - (d) Consider if there is any costs or expenses which you can waive now to assist tenants.
 - (e) Approach your tenant(s) and have open discussions about your tenant's financial situation, as well as discussions about the losses and overheads that you need to cover for your own business.
 - (f) Ask your tenant(s) to produce financial information which demonstrates their eligibility for the JobKeeper programme.

8. I am a tenant – what should I do?

- 8.1 Tenants should wait to the details in the Northern Territory legislation before reaching any agreement with their landlord.
- 8.2 In the meantime, tenants may wish to consider taking the below steps:
 - (a) Consider whether the Code applies to your business.
 - (b) Consider whether it will be more advantageous for you to negotiate an extension of the lease with a rent reduction, or whether you will vacate the premises when the lease expires.
 - (c) Gather relevant financial information and make sure you can demonstrate any loss of turnover and your eligibility for the JobKeeper programme.
 - (d) Start a conversation with your landlord.

9. Payroll tax, utilities bills and rates relief

- 9.1 On 8 April 2020 the Northern Territory Government released payroll tax and utilities bills relief.
- 9.2 It is anticipated that landlords will be able to benefit from rates relief soon to be provided by local councils.
- 9.3 The Northern Territory Government will also waive the property activation levy for relevant landlords whose property becomes vacant due to the outbreak of COVID-19.
- 9.4 However it has been made clear that landlords will only be able to access the above relief measures if they provide tenants rent relief in line with the Code.

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