

Fact sheet on leases in the Northern Territory

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Key points

- The Mandatory Code of Conduct has not been enacted as law in the Northern Territory, however some of the leasing principles have been incorporated into the legislation.
- The requirement for a Landlord to participate in 30 days of good faith negotiations prior to taking action by issuing a notice to quit are not limited to leases where the tenant is suffering financial hardship as a result of Covid-19.
- The leases or occupancy arrangement to which the Business Tenancies Act (and therefore the amendments) apply have not been altered.
- The requirement for mandatory mediation through NTCAT upon the Landlord applying for a Warrant of Possession is not limited to leases involving tenants who are suffering financial hardship.
- The Code will be applicable so far as it will form the criteria for what constitutes good faith negotiations for the mandatory negotiation period.

The introduction of the Code

On 7 April 2020, the National Cabinet Mandatory Code of Conduct for SME Commercial Leasing Principles During Covid-19 (Code) was issued by the National Cabinet, imposing a set of good faith leasing principles that apply to certain commercial tenancies experiencing financial stress or hardship because of the Covid-19 pandemic.

The Northern Territory Government subsequently introduced the *Tenancies Legislation Amendment Act (NT) 2020 (Act)* which has made temporary changes to the Business Tenancies Act (NT).

The amendments do not directly adopt the Code.

Summary of amendments to the Business Tenancies Act

The amendments:

1. Allow the minister to issue a modification notice "to make provisions in relation to aspects of business leases or occupation arrangements to which this Act does not otherwise apply". The modification notice may apply to:
 - a. a specified person, business lease or business premises;
 - b. a specified occupation arrangement;
 - c. a specified class of person, business lease or business premises;
 - d. a specified class of occupation arrangement;
 - e. all business leases.
2. Restrict the recovery of legal costs by a Landlord for proceedings exercising a right of re-entry or forfeiture brought during the emergency period, where the breach by the tenant occurred after commencement of the Act (25 April 2020).

3. Extends the timeframes in the Law of Property Act (**LPA**) (Part 8 Division 5) that apply to termination of Leases, by the mandatory negotiation period where the lease is for a period of 3 months or more and a modification notice specifying that minimum negotiation period has been gazetted.
4. Provides a process for how the Courts will deal with an application for a warrant of possession of business premises during the emergency period, which involves referring the matter to NTCAT for alternative dispute resolution.
5. Creates 2 new offences for intentionally or recklessly misrepresenting the financial situation of the party during the course of negotiations or intentionally or recklessly disclosing information about the other party's financial situation.

Relevant period

The changes are temporary and will be in place whilst the declaration of a public health emergency due to Covid-19 continues (currently to 26 June 2020).

Modification Notice

The Minister has now issued the *Business Tenancies COVID-19 Modification Notice 2020* (Modification Notice).

The Modification Notice:

1. requires a landlord to make good faith efforts to negotiate with the tenant for a period of not less than 30 days before issuing a notice to quit, to allow the tenant to remain in the premises (apart from a couple of specific exceptions¹); and
2. restricts the recovery of legal costs where a warrant for possession is made during the emergency period.

The amendments to the Business Tenancies Act (NT) do not directly incorporate the Code, however the Code will guide what are considered good faith negotiations in the circumstances. The Code requires each party to both negotiate in good faith AND to provide sufficient and accurate information within the context of the negotiations to achieve outcomes consistent with the Code.

Each arrangement between Landlord and tenant will be considered on a case by case basis and there will be many factors regarding what a reasonable outcome of negotiations would be, but where the tenant can demonstrate suffering financial hardship and a reduction in turnover as a result of Covid-19, this will likely include a reduction in rent and possibly a longer period for payment of any rent that is agreed to be paid.

Which leases does the Code apply to?

Although the Act gave the Minister powers to apply the Modification Notice to a broad range of people, leases premises and occupation arrangements, the Modification Notice:

- provides for a mandatory negotiation period before giving a notice to quit during the emergency period; and
- restricts the recovery of legal costs where an application for a warrant for possession is made during the emergency period.

But does **not**:

- alter the business premises or business leases to which the BTA applies or regulate occupation arrangements for the occupation of premises for business purposes that were not already subject to the BTA.

It should be noted that the national Code was intended to be:

- **mandatory** for tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic, where the tenant is eligible for the JobKeeper programme and has an annual turnover of up to \$50 million; and
- **recommended** as the principles upon which negotiations regarding leases outside of that criteria will be conducted.

Neither the Act nor the Modification Notice restrict the application of the provisions therein to small to medium enterprises (SMEs) suffering financial hardship.

The requirement for 30 days of mandatory good faith negotiations prior to issuing a notice to quit applies to all tenancies to which the applicable sections of the BTA would otherwise apply.

The requirement to go through the NTCAT mediation process upon making an Application for a Warrant of Possession of business premises applies to all applications, again without restricting the new process to matters involving an SME tenant suffering financial hardship.

Good faith negotiations

The Minister's explanatory statement stated the amendments were developed with a number of principles in mind, including:

- parties are expected to keep meeting their tenancy obligations where possible, including by making best efforts to access government support, mortgage relief, and to transition businesses to alternative working arrangements, where this is possible;
- where parties are struggling, they should at first attempt to negotiate to share the losses, with landlords strongly encouraged to reduce or defer rental obligations to assist tenants to get through the COVID-19 period without an unreasonable debt given the tenant's capacity to repay;
- where parties cannot agree, dispute resolution mechanisms take into account the COVID-19 situation, including the public interest in ensuring that businesses can 'hibernate' through the COVID-19 period, and the public interest in preventing homelessness and overcrowding particularly at this time, given the additional complexities involved in managing these issues and burden this would place on the public health system during a pandemic;

The principles reflect those principles outlined in the Code, but are not as specific.

What will constitute good faith negotiations will differ on a case by case basis, but given the timeline for implementation of the amendments to the legislation, we would expect that the Code would form the basis of those considerations.

What are the leasing principles in the Code?

When the landlords and the tenants negotiate their arrangements, 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 continue to comply with and observe the terms of their leases, subject to any amendments to their rental agreement negotiated under this Code;*

3. landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals, based on the reduction in the tenant's trade during the COVID-19 pandemic period and a reasonable subsequent recovery period. Such reduction may be up to 100% of the amount ordinarily payable by the tenant;
4. rental waivers must constitute no less than 50% of the total reduction in rent payable under 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. This requirement for a 50% minimum waiver may be waived by the tenant;
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 or insurance will be passed on to the tenant in the appropriate proportion;
7. landlords should seek to share any benefit it receives due to deferral of loan payments, provided by a financial institution to the tenants;
8. landlords should seek to waive recovery of any other expense (or outgoing payable) by a tenant during the period the tenant is not able to trade, where the landlords may reduce services in such circumstances;
9. if negotiated arrangements under this Code necessitate repayment, this should occur over an extended period, and such repayment shall only commence on the earlier of the COVID-19 pandemic ending or the existing lease expiring;
10. no fees, interest or other charges should be applied with respect to rent waived or deferred;
11. landlords must not draw on a tenant's security for the non-payment of rent;
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;
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;
14. landlords may not apply any prohibition or levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

What other issues might a Landlord need to consider?

Landlords should seek legal advice particular to their situation, but some of the issues which they may need to consider are:

1. Does the Lease include dispute resolution requirements that may apply in addition to, or for a longer period than those legislated?
2. If you are a trustee of a self-managed superannuation fund (SMSF), it is important that you keep evidence to demonstrate that you have also acted commercially responsible to the fund in the negotiation process and you will need to formally document your decision making in that regard.
3. If you hold a bank guarantee which expires on the termination date of the Lease, and you provide the tenant with a deferral of rent that extends past the expiry, you may need to reconsider that security.
4. What documentation do the parties need as evidence of their agreement, if they reach one?

If we can assist you to understand the impact of these changes on your particular circumstances, please contact us.

References:

1. Where the notice to quit is given by the landlord:
 - a. under s126 of the *Business Tenancy (Fair Dealings) Act 2003*,
 - b. 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

Disclaimer: The advice provided in this fact sheet is of a general nature only and should not be substituted for obtaining your own independent legal advice. If you have any further enquiries, please contact Ward Keller on (08) 8946 2999 or wardkeller@wardkeller.com.au for further advice.

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