

Mandatory Code of Conduct

The Federal Government yesterday released the National Cabinet Mandatory Code of Conduct for SME commercial leasing principles during the COVID-19 pandemic.

The Code is to apply for the life of the COVID-19 Pandemic Period and whilst the JobKeeper program remains operational. It is applicable in relation to SME tenancies suffering COVID-19 financial distress (as defined by their eligibility for the JobKeeper program).

An SME is a business with a turnover of up to \$50 million, and applies at a group level in relation to retail corporate groups (and not an individual brand or individual retail outlet level).

In its announcement, the Government said that the Code should also be applied “in spirit” to all leasing arrangements for affected businesses.

The Code is intended to be rolled out on a state-level through legislation and regulations, yet to be announced.

The following summarises the key principles applying to commercial leases.

Key Principles on Rent Relief

1. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of 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 COVID-19 pandemic period and a subsequent reasonable recovery period.
2. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle 1 above 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. Regard must also be had to the landlord’s financial ability to provide such additional waivers.

3. 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.
4. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period. This is intended to provide the tenant additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic concludes.
5. Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under the Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under the Code.
6. 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.
7. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
8. Landlords must not draw on a tenant’s security for the non-payment of rent (be this a cash bond, bank guarantee or personal guarantee) during the period of the COVID-19 pandemic and/or a reasonable subsequent recovery period.
9. 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, notwithstanding any arrangements between the landlord and the tenant.
10. No fees, interest or other charges should be applied with respect to rent waived and no fees, charges nor punitive interest may be charged on deferrals.
11. Any reduction in statutory charges (e.g. land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.



Mediation

Where landlords and tenants cannot reach agreement on leasing arrangements (as a direct result of the COVID-19 pandemic), the matter should be referred and subjected (by either party) to applicable state or territory retail/commercial leasing dispute resolution processes for binding mediation, including Small Business Commissioners/Champions/Ombudsmen where applicable.

Landlords and tenants must not use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.

The above is not exhaustive and further clarification is expected. Some of this detail will be provided in the coming weeks.

For further information on the implications of the code and its application to specific circumstances please contact apatterson@thelem.com.au or 02 9188 9606.

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