

CORONAVIRUS AND LEASES – WHAT ARE THE OPTIONS FOR TENANTS AND LANDLORDS?

National Leasing Code Relief Explained

By Fiona Yiend. 9 April 2020

The Government has recently announced a new leasing Code of Conduct to provide tenants with rental relief during the COVID19 pandemic. Below we explain what it means and how it may help your business.

What is the Code?

The National Cabinet Mandatory Code of Conduct (the Code) is a set of principles to apply to the negotiation of amendments in good faith to existing leasing arrangements. The [principles](#) are a set of guidelines that set out what landlords and tenants should be agreeing in relation to rental relief during the period businesses are impacted by the COVID-19 pandemic.

The Code, as announced by the Prime Minister on 7 April 2020, does not have automatic effect. Legislation will be passed in each state and territory to give effect to the Code. However, as parties of the national cabinet process, each state and territory has agreed to the Code, so the enabling legislation should be a formality.

Who does the Code apply to?

The Code applies to all tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government's JobKeeper programme, with an annual turnover of up to \$50 million. The Code is in place while the JobKeeper programme is in place.

Therefore, if your business is eligible for the JobKeeper programme and your annual turnover is less than \$50 million then the Code applies. For more information, see Source's [article](#) on the [JobKeeper programme and eligibility](#).

The Code does not apply to tenants who are not eligible for the JobKeeper programme, although the Government states that the principles of this Code should nevertheless apply in spirit to all leasing arrangements for affected businesses, having fair regard to the size and financial structure of those businesses.

It applies to *all commercial leases*, including retail, office and industrial leases, where the tenant meets the JobKeeper eligibility requirements.

How will the Code help tenants?

The Code provides principles to guide landlords and tenants in negotiating rental relief. Any relief needs to be agreed by the individual landlords and tenants taking into account the unique circumstances of each party. The Code provides a clear guideline of what is expected from landlords and tenants at this time.

The Code also provides for binding mediation if the landlord and tenant cannot agree on the appropriate relief taking into account the [principles](#).

[The principles of the Code are listed on page 4.](#)

What does this mean in practice?

In practice the Code provides relief to tenants in proportion to the negative impact that COVID-19 has on their business. The relief has two key components:

- Waiver of rent due; and
- Deferral of rent due.

A waiver of rent is a discount or reduction to the amount of rent which is required to be paid. It is not required to be repaid, i.e. the landlord “waives” its entitlement to that rent. Under the Code waivers must comprise at least 50% of the rental relief.

In comparison, rent which is deferred has to be paid back over the remaining term of the lease or at least 24 months, whichever is the greater.

The key is that the rent relief expected to be provided is proportionate to the downturn in business experienced by the tenant.

While this is the expectation, the position of each landlord and tenant is different and their individual circumstances have to be considered.

What if you can't reach agreement with the landlord?

The rental relief provided under the Code is incorporated into the lease by the agreement of both parties. If the parties cannot agree the Code provides for a binding mediation to take place.

The likely areas of dispute will be the extent to which the business inability to generate revenue is a direct result of COVID19 and how the financial ability of the landlord to provide the relief will be taken into account.

Example

If your usual rent is \$10,000 a month and your business has suffered a reduction of 30% due to COVID-19 it is reasonable, based on the Code, to expect to be able to negotiate a 15% reduction (or \$1,500 a month) in rent and a deferral of 15% (or \$1,500 a month) of the rent for the COVID-19 period.

So, if the COVID19 period lasts say 6 months, at the end of the period:

- You will have paid the reduced rent of: \$7,000 per month
- Accrued a debt to the landlord of: \$1,500 per month
- Benefited from a reduction of: \$1,500 per month.

Common Questions

I no longer want to be bound by the lease, can I terminate it?

No. The relief under the Code does not provide any basis for you to terminate your lease. In fact, it operates to the contrary. The rental relief benefits under the Code are only available if you continue in the lease.

What if the Code doesn't apply to my business but I still need/want relief?

Source has [summarised how lease obligations apply](#), which you can access on our [website](#). The key is to talk to your landlord and reach agreement.

What if the landlord and tenant can't agree?

If you cannot agree then you need to refer the matter to binding mediation. State based mechanisms are being made available to provide the structure for these mediations. At this stage the costs of the mediation process are unclear.

My business has fallen by 50% due to COVID19, can I just reduce my payments by 50%?

No. Agreement needs to be reached with the landlord first. If no agreement is reached and you fail to make payments as due you will be considered to be in breach of the lease.

What is the next step?

The message from the government has been consistent in relation to leasing – landlords and tenants need to work together to agree on a plan that will ensure that at the end of this crisis, your business can continue as a going concern and the landlord still has a rent-paying tenant. The first step is to engage in open and clear discussions with the landlord in the context of the [principles](#) set out in the Code.

[The principles of the Code are listed on page 4.](#)

Need help?

We are always happy to help. Contact [Fiona Yiend](#) if your business needs assistance.

Check out other COVID-19 resources on the Source website:

<https://www.sourcelegal.com.au/covid-19-response/>

Code of Conduct principles

The principles to be applied are:

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 remain committed to the terms of their lease, subject to any amendments to their rental arrangements 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.
3. 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.
4. From the rental relief provided, rental waivers should comprise no less than 50% of the relief. In circumstances where greater waivers are required to enable the tenant to fulfil their ongoing obligations under the lease agreement, rental waivers should form more than 50% of the relief. Regard must also be had to the Landlord's financial ability to provide such additional waivers. Tenants may also waive the requirement for a 50% minimum waiver by agreement.
5. Payment of rental deferrals by the tenant must be spread across 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 (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.
7. A landlord should seek to share with the tenant in a proportionate manner any benefit it receives due to deferral of loan payments, provided by a financial institution as part of the Australian Bankers Association's COVID-19 response or any other case-by-case deferral of loan repayments offered to other Landlords.
8. Landlords should, where appropriate, seek to waive recovery of any other expense (or outgoing payable) by a tenant, under lease terms, during the period the tenant is not able to trade. Landlords reserve the right to reduce services as required in such circumstances.
9. If negotiated arrangements under this Code necessitate repayment, this should occur over an extended period in order to avoid placing an undue financial burden on the tenant. No repayment should commence until the earlier of the COVID-19 pandemic ending (as defined by the Australian Government) or the

existing lease expiring, and taking into account a reasonable subsequent recovery period.

10. No fees, interest or other charges should be applied with respect to rent waived in principles 3 and 4 above and no fees, charges or punitive interest may be charged on deferrals in principles 3, 4 and 5 above.
11. 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.
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 outlined in principle 3 above. 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.
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, notwithstanding any arrangements between the landlord and the tenant.
14. Landlords may not apply any prohibition on levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.