



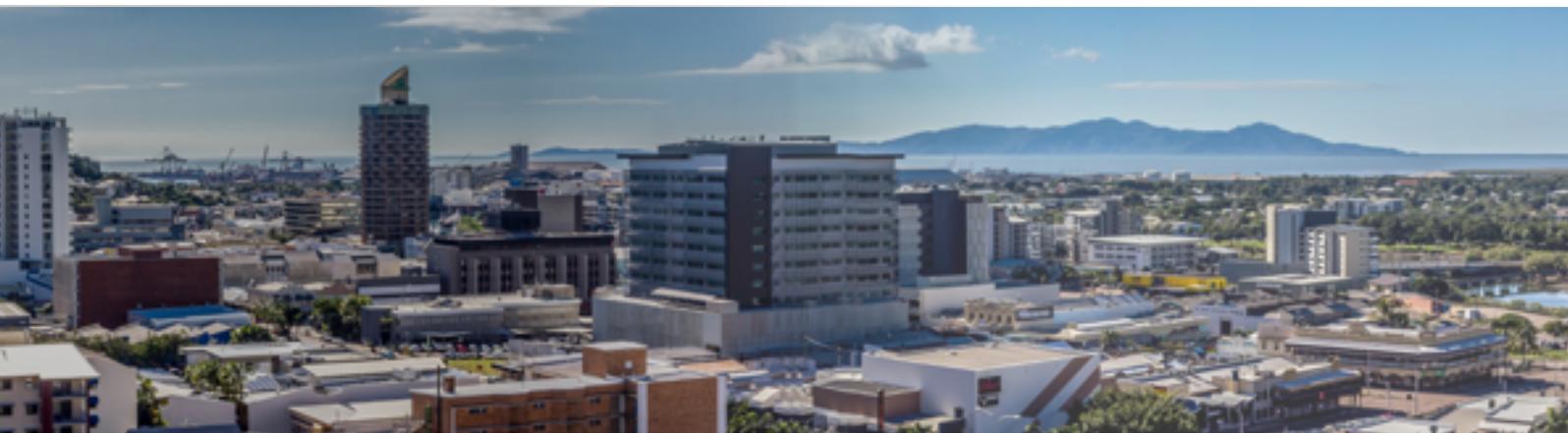
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# MANDATORY CODE OF CONDUCT

LANDLORDS & TENANTS - RETAIL, OFFICE, INDUSTRIAL AND OTHER  
COMMERCIAL PROPERTIES

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This commentary has been jointly prepared by [PVW](#) Partners and [wilson/ryan/grose](#).

Following the National Cabinet's announcement of a mandatory code of conduct for landlords and tenants in retail, office, industrial and other commercial properties (the Code), there will be many landlords and tenants keen to obtain certainty around their future cashflows and implement reasonable and appropriate measures. The following comments are intended to serve as a practical guide to help landlords and tenants implement reasonable and appropriate solutions that comply with the Code. Additionally, stakeholders should consult with their usual professional advisors to ensure their respective interests are protected.

Finally, while the Code is stated to be mandatory, many aspects of the Code will require further development and clarification at a state government level. Legislation giving rise to the Code (including fixing a commencement date) has yet to be drafted and/or passed by the relevant State and Territory Parliaments. We will update this commentary as the relevant legislation is passed.

## [OVERVIEW OF THE CODE](#)

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# OVERVIEW OF THE CODE



## 1. WHO IS AFFECTED?

- i. The application of the Code to various leases depends on the eligibility of the tenant without regard to the size, financial position/performance or composition of the landlord.
- ii. The Code will apply to leases (and therefore landlords and tenants) where the tenant is **both**:
  - a. A small or medium sized enterprise (annual turnover must be less than \$50 million per year). This turnover threshold will be applied in respect of franchises at the franchisee level and in respect of retail corporate groups at the group level (and not at the individual retail store level); and
  - b. Suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Federal Government JobKeeper Programme (primarily a reduction in turnover of 30% or more as a result of COVID-19 or 15% for certain not for profit entities).
- iii. The Code expresses an intention to apply “in spirit” to leasing arrangements of all business affected by the COVID-19 Pandemic even if they do not meet all of the eligibility criteria. Those tenants that do not meet all of the above criteria, and the landlords of such tenants, will not be able to avail themselves of the benefits of the Code. However, the Code may provide guidance in such leasing arrangements for negotiations between landlords and tenants affected by the COVID-19 pandemic.

## 2. COMMENCEMENT AND DURATION OF THE CODE

- i. Each State and Territory will be required to draft, introduce and pass legislation to commence the application of and give effect to the requirements of the Code.
- ii. Whilst a commencement date is yet to be fixed (in many states, including Queensland), the Code is intended to apply for the period of time during which the Federal Government JobKeeper Programme remains operational (the COVID-19 Pandemic Period, this currently being the months of April to September 2020).
- iii. Although a commencement date is yet to be fixed, the Code contemplates application from a date after 3 April 2020. Some commentary suggests that various states could implement legislation that applies retrospectively from this date.



### 3. WHAT IS BEING ASKED OF, AND REQUIRED OF, THE RELEVANT PARTIES

i. Agree tailored, bespoke and appropriate temporary arrangements that facilitate a resumption of normal activities “on the other side” of the COVID-19 Pandemic Period – the parties should be engaging and interacting to deliver mutually agreeable outcomes (within the mandates imposed by the code).

ii. Act in good faith to negotiate temporary amendments to lease terms– recognising that the risk of default on commercial leases is ultimately (and already) borne by a landlord and that there is a symbiotic relationship between the parties, they rely on each other, now more than ever.

iii. To act in an honest, open and transparent manner, collaborating where required with 3rd parties (e.g., banks) to assist each other in delivering the requisite outcomes.

iv. Engage in binding mediation procedures should they not be able to independently agree temporary changes to leasing arrangements.

v. The variations to leasing arrangements negotiated and agreed pursuant to the Code will likely need to be documented by way of a Deed executed by both the landlord and tenant for such variations to be binding on the parties. Legal advice will likely be required for the drafting and execution of that Deed.

vi. The Code seeks to promote flexibility for landlords and tenants. In that respect, the Code is not overly prescriptive but rather is based on a number of broad overarching principles. However, there are a number of positive obligations and restrictions that are required to be observed by the parties during the COVID-19 Pandemic Period (and in some cases, during a reasonable recovery period). These include:

**i. Commitment by tenant** - Tenants are obligated to remain committed to the terms of their lease. Material failure by a tenant to abide by the terms of their lease will forfeit any protections provided to that tenant under the Code.

**ii. Restriction on certain terminations** - Landlords must not terminate leases due to non-payment of rent. Care should be taken not to overextend this restriction. Provided a landlord takes into consideration the principles stipulated in the Code, the Code will not prevent a landlord from terminating a lease for reasons other than non-payment of rent.



**iii. Rent waivers and deferrals** – Landlords are obligated to reduce (by waivers and deferrals) rent in proportion to the decline in turnover experienced by a tenant as a result of the COVID-19 Pandemic. Such rent reductions may extend to 100% of the rent payable by a tenant pursuant to the terms of a lease (this would be the case where a tenant has seen a 100% decrease in their turnover). The Code stipulates that an amount of at least 50% of the rent reduction must be by way of waiver the balance of the rent reduction is to be deferred until after the COVID-19 Pandemic Period and amortised over the greater of the remaining life of the lease or 24 months. This may necessitate, or at least make desirable, an extension of the relevant lease or security arrangements where there is less than 24 months remaining on the term of the lease or security (such as a bank guarantee) allowing for the COVID-19 Pandemic Period. The Code specifically requires landlords to provide tenants with an opportunity to extend a lease in such circumstances.

**iv. Outgoings** – Whilst the Code requires any reduction in statutory or other charges (such as local authority rates, insurance premiums or land tax) to be passed on to the tenant, the Code does not require a landlord to “waive” the recovery of other outgoings. Provided the lease stipulates that outgoings are payable by a tenant in addition to the rent, the Code will not prevent a landlord from recovering such amounts. However, the Code does appear to ask landlords “where appropriate” to seek to waive recovery of outgoings during any period that a tenant is unable to trade.

**v. Prohibition on rent increases** – Landlords must not impose any rent increases. This is the case regardless of whether a rent increase is required by the lease. However, this restriction will not apply to leases that require a tenant to pay “turnover rent” in lieu of or in addition to a base rent.

**vi. Securities** – Landlords will be restricted from calling on bank guarantees, applying cash bonds or otherwise enforcing other forms or security (such as personal guarantees) as a result of a tenant’s failure to pay the required rent. The Code does not appear to restrict landlords from calling on (or enforcing) such securities in other circumstances (in addition to the failure of a tenant to pay rent). Again, the overarching principles of the Code would need to be considered before any action was taken to call on or enforce any form of security. Further, the Code does not prevent a landlord from requesting that a tenant extend the term of a security (such as a bank guarantee) to cover the period during which any deferred rent is to be repaid by a tenant.



**vii. Penalties and Interest** – Landlords must not impose any penalty on a tenant if a tenant reduces its opening hours due to the COVID-19 Pandemic. Further, a landlord must not charge any fees, interest or charges on any rent waived under the requirements of the Code. Further no fees, charges or interest of a punitive nature may be charged on any rent that may be deferred. There is scope to interpret the Code as possibly allowing a landlord to impose a reasonable (or commercial) amount of interest on any deferred rent. Provided always that the amount of interest is not seen to be punitive. Further guidance at a state level in this regard is required.

# WHAT TENANTS SHOULD BE DOING



- i. Review current lease arrangements – ensure you have a copy of the lease and any extension or variation documents to hand.
- ii. Review the Code and understand what their obligations are under the Code (including to follow the JobKeeper requirements, maintain lease terms other than those now to be temporarily revised, not seek to terminate the lease).
- iii. Documenting that they are a business or not for profit that turns over less than \$50m – in some cases this will be obvious, in others supporting documentation may be needed (especially where a business may be part of a franchise group or a larger corporate group).
- iv. Documenting that they are eligible for the JobKeeper Programme (i.e., a business that has suffered, or expects to suffer, a 30% reduction in turnover or a not for profit that has suffered, or expects to suffer, a 15% reduction in turnover) – this could be in the form of a confirmation notice from the ATO or be the same workings prepared in support of a claim made for the JobKeeper Programme.
- v. Formulating and documenting a methodology by which they can demonstrate actual levels of reduced turnover on a month to month basis. Again, this will be similar to the workings prepared to evidence eligibility for the JobKeeper Programme (but will likely be more involved and reflect an ongoing process). These workings should be simple and concise and prepared in a format that can be shared on an ongoing basis with the landlord (they should of course reflect actual trading results and be verifiable from data extracted directly from their accounting system).
- vi. Tenants must be prepared to be very transparent to landlords regarding their turnover and financial position. Tenants and landlords may wish to consider implementing confidentiality measures to ensure that sensitive information is dealt with appropriately. It may not be possible during this period to avoid or refuse to provide trading data to landlords.
- vi. Arriving at an initial position as to what their reduced turnover is or will be (now and in the coming months).
- vii. Consider by what mechanism you will provide ongoing information to your landlord (a suggested approach is the reporting of actual turnover relative to expected turnover for the month on a monthly in arrears basis).
- viii. While the COVID-19 Pandemic Period is expected to last for a 6 month period ending 27 September 2020, it also contemplates a “reasonable recovery period”. Consider what the “reasonable recovery period” for your business may be (as hard as that may be to address given so many unknowns into the future). It is expected that state legislation will provide some guidance on calculating the relevant “reasonable recovery period” for particular industries/leases.

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- ix. Preparing a briefing pack for their landlord that includes the above documentation and clearly sets out what rental relief is being sought pursuant to the Code.
  - x. Retaining and paying their employees and complying with the other terms of the JobKeeper Programme.
  - xi. Keep paying the rent they continue to be obligated to pay to their landlords in a timely manner (underpinned of course by enacting all other relevant business sustainability measures).
  - xii. Consult their financial advisors for advice on the most appropriate form of reporting on turnover and the reductions caused by the COVID-19 pandemic. Tenants should seek from their accountants a concise set of data that clearly evidences a reduction in trade measured against an appropriate metric. Ambiguity or interpretation should be avoided where possible.
  - xiii. Consult their legal advisors for advice and up to date information in relation to the implementation of state legislation enacting the Code. Tenants should also seek advice from their legal advisors as to their obligations under their existing leases and how those obligations are likely to be varied, in a practical sense, by the implementation of the Code and the best mechanism to use in making such a variation to the relevant lease.

# WHAT LANDLORDS SHOULD BE DOING



- i. Review current lease arrangements – ensure you have a copy of the lease and any amendments or variations to hand. Consider the expiry date of the current term of the lease and the timing and mechanism of any forthcoming rent reviews.
- ii. Review the Code and understand what their obligations are under the Code (including rental waiver obligations [must be at least 50% of the reduced rent amount], rental deferral obligations, maintain other lease terms, freeze on lease increases, non-termination of lease due to non-payment of rentals, not seeking to access or enact lease security arrangements).
- iii. Engage with relevant 3rd parties to access any other support mechanisms (e.g., reductions or deferrals in council rates, land tax etc – noting that any such reductions are to be proportionately passed onto tenants or outgoings waived entirely where a tenant is not able to trade).
- iv. Consider lease term extensions with tenants
- v. Considering their cash flow position and what additional financial support may be needed now and over the next few years, including to cover the lost rental income and rental deferral arrangements likely to be a feature of these negotiations (noting that a reasonable rate of interest may be charged to tenants on the deferred rent component only)
- vi. If relevant, discussing their position with their bank and confirming what support is available in terms of loan and interest payments.
- vii. Consider whether they have any insurance cover that could compensate them for loss of rental income (albeit early indications are that most policies will not cover losses attributable to COVID-19).
- viii. Consider beginning to communicate with their tenant(s) and advising the tenant(s) of the data that the landlord will be seeking to substantiate a loss in turnover and to assess the tenant's eligibility for the application of the Code. Advice should first be taken by a landlord from the landlord's accountant so as to be specific as to the reporting requirements.
- ix. Consider contacting their legal advisor so as to discuss and implement a process by which to negotiate with tenants. Particularly, if a landlord has multiple tenants, a negotiation framework will be beneficial so as to reduce costs, uncertainty and to otherwise preserve (to the best extent possible) cordial relations between the landlord and tenant.

**For assistance with legal queries in relation to these matters please contact [wilson/ryan/grose](#).**

**For assistance with accounting and financial management queries in relation to these matters please contact [PVW Partners](#).**



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