



PRYOR
TZANNES
& WALLIS
SOLICITORS & NOTARIES

CODE OF CONDUCT FOR COMMERCIAL TENANCIES

COVID-19 UPDATES

*The National Cabinet released a **mandatory** Code of Conduct on 3 April 2020 to guide the necessary negotiations between landlords and tenants of commercial tenancies during the Covid-19 pandemic. Here we summarise the fourteen principles outlined in the Code which must be followed when formulating temporary leasing arrangements.*

OVERVIEW

The Code sets out “good faith” leasing principles for landlords and tenants of commercial tenancies. The principles are to be applied by landlords on a case-by-case basis. Any temporary arrangements agreed to will be proportionate to the impact on the tenant’s revenue, expenses and profitability due to the pandemic.

The Code’s objective is to “share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords” – National Cabinet Mandatory Code of Conduct

The Code applies to all commercial tenancies (retail, office and industrial leases) experiencing financial stress or hardship due to COVID-19. Eligibility is defined by the tenant’s eligibility for the JobKeeper programme (30% reduction in turnover, where turnover is \$50 million or less).



PRINCIPLE 1

PROHIBITION ON LEASE TERMINATION

Landlords must not terminate leases due to non-payment of rent during the crisis period (or reasonable subsequent recovery period thereafter).

PRINCIPLE 2

TENANTS' COMMITMENT TO LEASE

Tenants must remain committed to the terms of the lease subject to any amendments negotiated pursuant to the Code. If there is a material failure by the tenant to abide by the substantive terms of the lease, they will forfeit any protections afforded to the tenant under the Code.

PRINCIPLE 3

PROPORTIONATE RENT REDUCTIONS

Landlords must offer tenants proportionate reductions in rent payable in the form of **waivers** and **deferrals** up to 100% of the amount ordinarily payable. This reduction is to be based on the reduction in the tenant's trade during the pandemic and subsequent reasonable recovery period thereafter.

A 50% reduction in a tenant's turnover would result in 50% cash flow relief. At least half of this relief is to be in the form of a rent waiver.

PRINCIPLE 4

RENTAL WAIVERS

Rental waivers must constitute **no less than 50% of total reduction** in rent payable. There should be a greater proportion of rent waived if failure to do so would compromise the tenant's capacity to fulfil their ongoing obligations under the lease. The landlord's financial situation is to be considered when providing additional waivers.

PRINCIPLE 5

RENT DEFERRALS

Payment of rent deferrals by the tenant must be spread over the balance of the lease term or for a period of no less than 24 months, whichever is the greater (unless otherwise agreed between landlord and tenant).

PRINCIPLE 6

STATUTORY CHARGES

Any reduction in statutory charges (land tax, council rates etc.) or insurance that the landlord 'enjoys' shall be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.

PRINCIPLE 7

SHARING BENEFITS

A landlord should seek to share, in a proportionate manner with the tenant, 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.

PRINCIPLE 8

WAIVING CERTAIN EXPENSES

Landlords should, where it is appropriate to do so, waive recovery of any other expense or outgoing payable by a tenant under lease terms, during the period the tenant is unable to trade. A landlord reserves the right to reduce services as required in the circumstances.

PRINCIPLE 9

REPAYMENT PERIOD

If, due to negotiations under the Code there are repayments to be made by the tenant, then these repayments should occur over an extended period. This is to avoid placing undue financial burden on the tenant. No repayments 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 thereafter.

PRINCIPLE 10

FEES, INTEREST AND OTHER CHARGES

No fees, interest or other charge are to be applied with respect to rent waived in principles 3 and 4 above and no fees, charges nor punitive interest may be charged on deferrals in principles 3, 4, and 5

PRINCIPLE 11

NO DEDUCTIONS FROM TENANT'S SECURITY FOR NON-PAYMENT OF RENT

Landlords must not deduct from a tenant's security for the non-payment of rent (e.g. cash bond, bank guarantee or personal guarantee) during the COVID-19 pandemic period and/or a reasonable subsequent recovery period.

PRINCIPLE 12

OPPORTUNITY TO EXTEND LEASE

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 2. This is intended to provide the tenant additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic ends.

PRINCIPLE 13

FREEZE ON RENT INCREASES

Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the pandemic and a reasonable subsequent recovery period thereafter, despite any arrangements between the landlord and the tenant.

PRINCIPLE 14

NO PROHIBITION OR PENALTIES

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.

MEDIATION REQUIREMENTS

Where a landlord and tenant cannot reach agreement on leasing arrangements under this Code the matter is to be referred by either landlord or tenant to the relevant state retail/commercial leasing dispute resolution body (including 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). Landlords and tenants must not use the mediation process to prolong or hinder the facilitation of amicable resolution outcomes.

DEFINITIONS

Financial Stress or Hardship

An individual, business or company's inability to generate sufficient revenue as a direct result of the COVID-19 pandemic (including government-mandated trading restrictions) that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments. Tenants eligible for the JobKeeper payment are considered to be in financial distress under the Code.

Sufficient and Accurate Information

Includes information generated from an accounting system and information provided to and/or received from a financial institution, that impacts the timeliness of the Parties making decisions with regard to the financial stress caused directly by COVID-19.

Waiver and Deferral

References to waiver and deferral may also be interpreted to include other forms of agreed variations to existing leases (e.g. deferral, pausing and/or hibernating the lease), or any other such commercial outcome of agreements reached between the parties. Any amount of reduction provided by a waiver may not be recouped by the Landlord over the term of the lease.

Proportionate

The amount of rent relief proportionate to the reduction in trade as a result of the COVID-19 pandemic plus a subsequent reasonable recovery period, consistent with assessments undertaken for eligibility for the Commonwealth's JobKeeper payment.



Pryor Tzannes & Wallis' Commercial and Leasing Team is closely monitoring developments in this area. We are available to review your leasing arrangements and advise you in relation to the principles and your rights under this Code.

