

Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021

Disallowable instrument DI2021–218

made under the

[Leases \(Commercial and Retail\) Act 2001](#), s 177 (Declaration—COVID-19 emergency response)

1 Name of instrument

This instrument is the *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021*.

2 Commencement

This instrument commences on the day after its notification day.

3 Expiry

This instrument expires on—

- (a) the first day no COVID-19 emergency is in force; or
- (b) if a later day is notified by the Minister under the Act, section 177 (3) (b)—that day.

Note The Minister may notify a day (not later than 3 months after the COVID-19 emergency ends) under the Act, s 177 (3) (b) if the Minister considers the effect of the COVID-19 pandemic justifies this instrument being in force for a period after the COVID-19 emergency ends.

4 Definitions

- (1) In this instrument:

impacted tenant means a tenant under a prescribed lease who—

- (a) is an SME entity; and
- (b) satisfies the decline in turnover test under section 5.

prescribed breach, by an impacted tenant—

- (a) means a failure by the tenant during the prescribed period—
 - (i) to pay rent; or

- (ii) to pay outgoings or other amounts due under the lease; or
 - (iii) to operate the business on the premises under the lease during the hours required under the lease; and
- (b) includes a breach mentioned in paragraph (a) of a lease as varied following negotiations required by previous declarations under the Act, section 177.

Example—par (b)

An impacted tenant under a previous declaration and a lessor agree that the tenant will pay a reduced rent for a certain period. Because of the economic impact of the outbreak of the delta variant of COVID-19, the tenant fails to pay the reduced rent at the end of August 2021. The tenant's failure to pay the reduced rent is a prescribed breach under this instrument.

prescribed lease—

- (a) means a lease to which the Act applies that was entered into before 12 August 2021; and
- (b) includes—
 - (i) an extension of the term of a lease mentioned in paragraph (a) (the ***original lease***) made on or after 12 August 2021; and
 - (ii) a renewal of lease entered into on or after 12 August 2021 that is substantially on the same terms as the original lease; and
 - (iii) a lease arising, on or after 12 August 2021, from the tenant holding over after the end of the original lease.

prescribed period means the period—

- (a) beginning on 12 August 2021; and
- (b) ending on—
 - (i) the first day no COVID-19 emergency is in force; or
 - (ii) any later day notified by the Minister under the [Act](#), section 177 (3) (b).

Note The Minister may notify a day (not later than 3 months after the COVID-19 emergency ends) under the Act, s 177 (3) (b) if the Minister considers the effect of the COVID-19 pandemic justifies this instrument being in force for a period after the COVID-19 emergency ends.

turnover, of a tenant, includes—

- (a) turnover from internet sales of goods or services; and
 - (b) any COVID-19 business support grants from the ACT government.
- (2) In this section:

business, includes business conducted on a not-for-profit basis.

corporate group means a corporation and all its related bodies corporate.

COVID-19 emergency means—

- (a) a state of emergency declared under the *Emergencies Act 2004*, section 156 because of the coronavirus disease 2019 (COVID-19); or
- (b) an emergency declared under the *Public Health Act 1997*, section 119 (including any extension or further extension) because of the coronavirus disease 2019 (COVID-19).

lease to which the Act applies—see the *Act*, section 177 (5).

related body corporate—see the *Corporations Act*, section 9.

SME entity means a tenant—

- (a) who carried on business for the whole of the financial year ending 30 June 2021 and had an annual turnover for that year of less than \$50 million; or
 - (b) who did not carry on a business for the whole of the financial year ending 30 June 2021 and whose annual turnover for the financial year ending 30 June 2022 is likely to be less than \$50 million.
- (3) For subsection (2), definition of **SME entity**, a reference to **business** means—
- (a) for a franchisee in a business—the business conducted at the premises or land under the lease; or
 - (b) for a member of a corporate group—the business of the group; or
 - (c) for any other tenant—the business conducted by the tenant.

5 Decline in turnover test

- (1) For this instrument, a tenant **satisfies the decline in turnover test** if—
- (a) the tenant's turnover for any month in the prescribed period (including August 2021) (an **impacted month**) falls short of the following (**the comparison turnover**):
 - (i) the tenant's turnover for a comparison month;
 - (ii) if the tenant did not carry on business in 2019 or 2020—an amount of turnover negotiated in good faith and agreed by the lessor and tenant; and
 - (b) the shortfall, expressed as a percentage of the comparison turnover equals or exceeds—
 - (i) for a tenant conducting a business on a not-for-profit basis—15%; or
 - (ii) for any other tenant—30%.
- (2) In this section:
- comparison month**, for an impacted month, means—
- (a) the same month as the impacted month in 2019; or

- (b) if the tenant did not carry on business in 2019—the same month as the impacted month in 2020.

6 Meaning of *good faith negotiations*

- (1) For this instrument, a lessor engages in *good faith negotiations* with an impacted tenant if the lessor, in acknowledging the financial hardship suffered by the tenant because of the economic impact of the coronavirus disease 2019 (COVID-19), negotiates with the tenant having regard to the overarching principles and leasing principles set out in the code of conduct.

- (2) In this section:

code of conduct means the National Code of Conduct for SME Commercial Leasing Principles as set out in schedule 1 with any reference to a tenant being eligible for the Commonwealth Government’s Jobkeeper payment to be read as a reference to the tenant being an impacted tenant under this instrument.

7 Application

- (1) This instrument applies to any termination notice given to, or prescribed action taken against, an impacted tenant by the lessor in relation to a prescribed breach, including—

- (a) a termination notice given in relation to the breach after the day this instrument expires; and
- (b) any prescribed action taken by the lessor against the tenant in relation to the breach after the day this instrument expires.

- (2) To remove any doubt, nothing in this instrument prevents the lessor terminating or taking prescribed action against an impacted tenant in relation to a prescribed breach if—

- (a) the tenant agrees to the termination or action; or
- (b) the lessor has engaged in good faith negotiations with the tenant and the tenant surrenders the lease.

- (3) In this section:

prescribed action—see section 10 (2).

8 Lessor must negotiate before giving termination notice for prescribed breaches

- (1) A lessor must not give a termination notice to an impacted tenant in relation to a prescribed breach unless the lessor has engaged in good faith negotiations with the tenant in relation to the breach.
- (2) A termination notice given in contravention of subsection (1) is void.

9 Existing termination notices for prescribed breaches

- (1) This section applies if—
 - (a) a lessor has given an impacted tenant a termination notice in the pre-commencement period in relation to a prescribed breach; and
 - (b) either—
 - (i) the tenant contests the termination under the [Act](#), section 122 (2); or
 - (ii) the lessor applies to the Magistrates Court for confirmation of the termination under the [Act](#), section 124 (2).
- (2) The Magistrates Court must not confirm the termination unless satisfied that the lessor has engaged in good faith negotiations with the impacted tenant.
- (3) In this section:

pre-commencement period means the period beginning on the day the prescribed period started and ending the day before this instrument commences.

10 Other actions by lessor against tenant

- (1) A lessor must not take any prescribed action against an impacted tenant in relation to a prescribed breach unless the lessor has engaged in good faith negotiations with the tenant in relation to the breach.
- (2) In this section:

prescribed action, by a lessor against an impacted tenant, means taking action under the lease or starting a proceeding for any of the following:

- (a) eviction of the tenant from premises or land under the lease;
- (b) giving a notice to vacate in relation to holding over period under the lease;
- (c) exercise of a right of re-entry to the premises or land;
- (d) recovery of the premises or land;
- (e) distraint of goods on the premises or land;
- (f) forfeiture;
- (g) damages;
- (h) requiring payment of penalty interest on, or a fee or charge related to, unpaid rent otherwise payable by the tenant;
- (i) recovery of the whole or part of a security bond under the lease;
- (j) performance of obligations by the tenant or any other person guaranteeing the tenant's obligations under the lease;
- (k) possession of the premises or land;

- (l) any other remedy otherwise available against the tenant under a territory law.

11 Guidelines

- (1) The Minister may make guidelines in relation to the following matters:
 - (a) for section 5—how a tenant’s turnover is to be worked out;
 - (b) how good faith negotiations are to be conducted by impacted tenants and lessors;
 - (c) how the overarching principles and leasing principles set out in the code of conduct are to be applied by impacted tenants and lessors in good faith negotiations;
 - (d) any other relevant matter.
- (2) A guideline is a notifiable instrument.

12 Previous declarations

- (1) To remove any doubt, the repeal or expiry of a previous declaration does not—
 - (a) affect any right, remedy, protection or requirement arising in relation to a prescribed breach under the previous declaration; or
 - (b) affect any negotiation or agreement started or completed under, or in accordance with, the previous declaration.
- (2) In this instrument:

previous declaration means—

- (a) the *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (DI2020-92)*; or
- (b) the *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No 2) (DI2020-283)*.

Shane Rattenbury
Attorney-General
31 August 2021

Schedule 1 Code of conduct

(see s 6 (2))

NATIONAL CABINET MANDATORY CODE OF CONDUCT

SME COMMERCIAL LEASING PRINCIPLES DURING COVID-19

PURPOSE

The purpose of this Code of Conduct (“the Code”) is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government’s JobKeeper programme.

These principles will apply to negotiating amendments in good faith to existing leasing arrangements –to aid the management of cashflow for SME tenants and landlords on a proportionate basis –as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus (“COVID-19”) pandemic.

This 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 (herein referred to as “SME tenants”).

The \$50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

The Parties to this Code concur that during the COVID-19 pandemic period, as defined by the period during which the JobKeeper programme is operational, 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.

Appendix I gives examples of proportionate solutions that may be agreed under this Code, and forms part of the overall Code.

The Code has been developed to enable both a consistent national approach and timely, efficient application given the rapid and severe commercial impact of official responses to the COVID-19 pandemic.

PARTIES TO THE CODE

The Code will be given effect through relevant state and territory legislation or regulation as appropriate. The Code is not intended to supersede such legislation, but aims to complement it during the COVID-19 crisis period.

OVERARCHING PRINCIPLES

The objective of the Code 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.

It is intended that landlords will agree tailored, bespoke and appropriate temporary arrangements for each SME tenant, taking into account their particular circumstances on a case-by-case basis.

The following overarching principles of this Code will apply in guiding such arrangements:

- Landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period.
- Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes.
- Landlords and tenants will negotiate in good faith.
- Landlords and tenants will act in an open, honest and transparent manner, and will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code.
- Any agreed arrangements will take into account the impact of the COVID-19 pandemic on the tenant, with specific regard to its revenue, expenses, and profitability. Such arrangements will be proportionate and appropriate based on the impact of the COVID-19 pandemic plus a reasonable recovery period.
- The Parties will assist each other in their respective dealings with other stakeholders including governments, utility companies, and banks/other financial institutions in order to achieve outcomes consistent with the objectives of this Code.
- All premises are different, as are their commercial arrangements; it is therefore not possible to form a collective industry position. All parties recognise the intended application, legal constraints and spirit of the Competition and Consumer Act 2010.
- The Parties will take into account the fact that the risk of default on commercial leases is ultimately (and already) borne by the landlord. The landlord must not seek to permanently mitigate this risk in negotiating temporary arrangements envisaged under this Code.

- All leases must be dealt with on a case-by-case basis, considering factors such as whether the SME tenant has suffered financial hardship due to the COVID-19 pandemic; whether the tenant’s lease has expired or is soon to expire; and whether the tenant is in administration or receivership.
- Leases have different structures, different periods of tenure, and different mechanisms for determining rent. Leases may already be in arrears. Leases may already have expired and be in “hold-over.” These factors should also be taken into account in formulating any temporary arrangements in line with this Code.
- As the objective of this Code is to mitigate the impact of the COVID-19 pandemic on the tenant, due regard should be given to whether the tenant is in administration or receivership, and the application of the Code modified accordingly.

LEASING PRINCIPLES

In negotiating and enacting appropriate temporary arrangements under this Code, 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 remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under this Code.
3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under “definitions,” below) 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. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 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. Tenants may waive the requirement for a 50% minimum waiver by agreement.
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 (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 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, with the tenant in a proportionate manner.

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 nor 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 item #2 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.

BINDING 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.

DEFINITIONS

The following definitions are provided for reference in the application of this Code.

1. 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. SME tenants which are eligible for the federal government's JobKeeper payment are automatically considered to be in financial distress under this Code.

2. Sufficient and accurate information: this 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 as a direct result of the COVID-19 event.

3. Waiver and deferral: any reference to waiver and deferral may also be interpreted to include other forms of agreed variations to existing leases (such as 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.

4. 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 programme.

CODE ADMINISTRATION COMMITTEE

This Code will be supported by state based Industry Code Administration Committees, comprising representatives from relevant industry bodies representing landlord, tenant and SME interests, with an Independent Chair appointed by the relevant State/Territory Government.

Committee members' roles will be to (1) promote awareness of the Code; (2) encourage application of the Code; (3) encourage its application by the broader retail industry; and (4) monitor the operation of the Code.

The Committee should meet at least fortnightly, and may communicate and meet via email, telephone calls, or video conferencing.

No formal minutes will be taken; however, the Committee will document key action items and outcomes of each meeting.

The Committee may invite advisers, upon agreement by all Committee members, to assist on specific issues in the course of discharging their obligations under this section.

COMMENCEMENT/EXPIRY

This Code comes into effect in all states and territories from a date following 3 April 2020 (being the date that National Cabinet agreed to a set of principles to guide the Code to govern commercial tenancies as affected by the COVID-19

pandemic) to be defined by each jurisdiction, for the period during which the Commonwealth JobKeeper program remains operational.

APPENDIX I

EXAMPLES OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

The following scenarios are examples only, noting the circumstance of each landlord, SME tenant and lease are different, and are subject to negotiation and agreement in good faith.

Examples of practical variations reflecting the application of the principle of proportionality may include, but are not limited to:

- Qualifying tenants would be provided with cash flow relief in proportion to the loss of turnover they have experienced from the COVID-19 crisis
 - ie. a 60% loss in turnover would result in a guaranteed 60% cash flow relief.
 - At a minimum, half is provided as rent free/rent waiver for the proportion of which the qualifying tenant's revenue has fallen.
 - Up to half could be through a deferral of rent, with this to be recouped over at least 24 months in a manner that is negotiated by the parties
 - So if the tenant's revenue has fallen by 100%, then at least 50% of total cash flow relief is rent free/rent waiver and the remainder is a rent deferral. If the qualifying tenant's revenue has fallen by 30%, then at least 15% of total cash flow relief is rent free/rent waiver and the remainder is rent deferral.
 - Care should be taken to ensure that any repayment of the deferred rent does not compromise the ability of the affected SME tenant to recover from the crisis.
 - The parties would be free to make an alternative commercial arrangement to this formula if that is their wish.