

Principle	Commonwealth	New South Wales	Victoria	Queensland
Relevant Code / Legislation	<i>National Code of Conduct (the "National Code")¹</i>	<i>Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)</i> <i><u>Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2020 (NSW Amendment)</u></i>	<i>COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 (VIC)</i>	<i>Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (QLD) made under the COVID-19 Emergency Response Act 2020 (QLD).</i>
Applicable Period	Duration of JobKeeper program, being 4 April 2020 - 27 September 2020.	The Prescribed Period, being 24 April 2020 - 24 October 2020.	29 March 2020 - 29 September 2020.	The response period, being 29 March 2020 - 30 September 2020
Eligibility requirements	SME Tenants <ul style="list-style-type: none"> eligible for the National JobKeeper scheme²; and annual turnover of < \$50 million. This extends to turnover both of the relevant entity and all connected and affiliated entities (which may extend to foreign holding companies). Franchisees are assessed on an individual basis however. 	Commercial Leases Retail shop leases and other commercial (non-retail) leases that fall under the <i>Conveyancing Act 1919</i> (NSW). Impacted Lessee <ul style="list-style-type: none"> qualifies for the National JobKeeper scheme; and turnover in the 2018-2019 FY of < \$50 million (assessed at group level for related bodies corporate as 	Eligible leases Retail lease, non-retail commercial leases or commercial licence, under which the Tenant is: <ul style="list-style-type: none"> an SME entity (annual turnover is < \$50 million, assessed on an aggregated group basis similar to the National Code test); and qualifies for, and is a participant in, the JobKeeper Scheme. 	Affected leases Retail shop leases under the <i>Retail Shop Leases Act 1994</i> (Qld), and non-retail commercial leases for the sole or predominant purpose of carrying on a business at the premises, both where the lessee is: <ul style="list-style-type: none"> an SME entity, meaning an entity carrying on business in this financial year that expects annual turnover for the current financial year to be less than \$50 million, or an entity that had actual annual turnover of less

¹ Whilst the National Code has been developed to enable a consistent national approach, it is not effective of itself and the States and Territories must each separately introduce legislation to give effect to the National Code

² A tenant is eligible for the JobKeeper scheme if: (a) on 1 March 2020, the tenant carried on a business in Australia or was a non-profit body that pursued its objectives principally in Australia; and (b) the tenant satisfies the "decline in turnover" test - i.e. the tenant's GST turnover has fallen by the relevant amount during its relevant comparison period. There are specific turnover decline test thresholds that apply to tenants of varying turnover sizes and the period in which the test can be applied. The decline test thresholds are as follows:

- 30% fall in turnover for a business with an aggregated turnover of \$1 billion or less;
- 50% fall in turnover for a business with an aggregated turnover of more than \$1 billion; or
- 15% fall in turnover for ACNC-registered charities (other than universities and schools).

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		<p>defined under the <i>Corporations Act 2001</i> (Cth)).</p> <p>Does not include leases under the <i>Agricultural Tenancies Act 1990</i> (NSW).</p>	Does not include leases where premises used wholly or predominantly for agricultural, farming, grazing etc.	<p>than \$50 million in the 2018-2019 financial year, on the basis that turnover includes internet sales but does not include government assistance to mitigate the effects of COVID-19; and</p> <ul style="list-style-type: none"> either: <ul style="list-style-type: none"> is eligible for the JobKeeper scheme; or an entity connected with or an affiliate of the lessee employs (or is involved in employing) staff for the business carried on at the premises and is so eligible. <p>Exclusions Does not include:</p> <ul style="list-style-type: none"> a lease under which premises are to be used wholly or predominantly for a farming business under the <i>Farm Business Debt Mediation Act 2017</i>, schedule 1; and most State leases, permits, licences and subleases under the <i>Land Act 1994</i> (Qld), because the <i>Land (COVID-19 Emergency Response-Waiver and Deferral of Rents and Instalments) Regulation 2020</i> (Qld) already provides relief to lessees under such arrangements.
Freeze on rent increases (Principle #13)	During the Period, and reasonable subsequent recovery period (<i>undefined</i>). This does not extend to components of rent with reference to turnover.	Lessor cannot take any prescribed action after the Period against an Impacted Lessee for failure to pay any rent increased during the Period.	Unlike NSW, the VIC regulation is silent on whether or not a Landlord is prohibited from recovery of rent increases that would have applied during the Period but for the application of the regulation.	The Lessor under an affected lease must not increase the rent payable by the lessee during the response period (other than in respect of rent based on turnover).

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				If the lease provides for a review of rent during the response period, the Lessor may review the rent under the lease but must not give effect to an increase in rent until the response period ends, and only in respect of the period after the response period.
Waivers/Deferrals of rent (Principles #3, #4, #5, #10)	<p>Landlords must offer proportionate reductions in rent payable. Rental waivers must constitute no less than 50% of the total reduction in rent payable.</p> <p>Payment of rental deferrals to be amortised over the balance of the lease term or for a period of no less than 24 months (unless agreed).</p> <p>No fees, punitive interest or other charges should be applied to rent waived or charged on deferrals.</p> <p>If negotiated arrangements necessitate repayment, this should occur over an extended period. No repayment should commence until the earlier of the COVID-19 pandemic ending (<i>as defined by the Australian Government</i>) or the existing lease expiring, and taking into account a reasonable subsequent recovery period.</p>	<p>Cross-reference to National Code. The Regulations require the parties to a commercial lease <u>to which an Impacted Lessee is a party</u> to act in good faith to negotiate rent and other terms at the request of a party.</p> <p>When negotiating rent, parties are to have regard to:</p> <ul style="list-style-type: none"> the economic impacts of the COVID-19 pandemic, and the leasing principles set out in the National Code. <p>Note: A Lessor is not mandated to make offers of rent relief, however, the Lessor cannot take prescribed action against an Impacted Lessee for failure to pay rent during the Period (see below).</p> <p><u>Note: The above changes extend to renegotiations that have commenced but not been completed before commencement of the NSW Amendment (on 3 July 2020) but do not extend to a matter for which proceedings have been commenced.</u></p>	<p>Waivers</p> <p>Upon request by Tenant and supply of evidence, a Landlord must offer rent relief within 14 days or other agreed time, which must, based on all circumstances of the lease:</p> <ul style="list-style-type: none"> relate to up to 100% of the rent payable; comprise a rental waiver in respect of no less than 50% of the rent unless agreed; apply to the Period; take into account: <ul style="list-style-type: none"> the reduction in Tenant's turnover; a Landlord's offer of rent relief is not required to match a Tenant's decline in turnover; rather this is just one factor that a Landlord must consider in making an offer of rent relief; Landlord's financial ability to offer rent relief; whether failure to offer relief would compromise a Tenant's capacity to fulfil other obligations; 	<p>The Regulations require the parties to cooperate and act reasonably and in good faith to negotiate rent and other terms if a request is made.</p> <p>Waivers</p> <p>Upon request by any party to the lease, the parties must give each other prescribed information. The Lessor must then offer a reduction in the amount payable under the lease within 30 days, and any proposed changes to other stated conditions in the lease.</p> <p>The offer must relate to any or all of the rent payable under the affected lease during the response period and provide for no less than 50% of the rent reduction offered to be in the form of a waiver of rent.</p> <p>The following factors must be taken into account:</p> <ul style="list-style-type: none"> all of the circumstances of the lessee and affected lease (although the proportion of rent waived does not have to match the reduction in the lessee's turnover);

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Moratorium on evictions for non-payment of rent (Principle #1)				<p>the conditions on which the rent is deferred;</p> <ul style="list-style-type: none"> the Lessor can continue to hold the Lessee's security deposit until the deferred rent is paid (although we note that security deposits are relatively rare, with most security taking the form of a personal guarantee and/or bank guarantee). <p>Where the Lessor provides a rental waiver and/or deferral, it must also offer the Lessee an extension to the term of the lease (on the same lease conditions), except that the rent during the extension period must be adjusted for the waiver or deferral. The extension period must be equivalent to the waiver or deferral period.</p> <p>However, this obligation does not apply to the extent that either:</p> <ul style="list-style-type: none"> the Lessor is subject to an inconsistent existing legal obligation, such as a lease that it has granted to a third party, which was due to take effect after the expiry of the current lessee's term; or the Lessor demonstrates that it intends to use the leased premises for a commercial purpose of the Lessor (which is not further explained).
	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic	The Lessor cannot terminate or exercise a right of re-entry/recovery of the premises for:	Landlord cannot evict Tenant or re-enter premises for:	<p>Lessor cannot exercise a right or recovery or evict a lessee for:</p> <ul style="list-style-type: none"> non-payment of rent; failure to pay outgoings; or

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	period (or reasonable subsequent recovery period).	<ul style="list-style-type: none"> an Impacted Lessee's failure to pay rent or outgoings; or the business operating under the lease to which an Impacted Lessee is a party not opening for business during hours specified in the lease. 	<ul style="list-style-type: none"> non-payment of rent, but Tenant must provide evidence; or reducing or ceasing hours of trade. 	<ul style="list-style-type: none"> if the business carried on at the leased premises is not open for business during the hours required under the lease.
Obligation to renegotiate (see Overarching Principles)	Landlords and Tenants are required to discuss relevant issues, and to negotiate appropriate temporary leasing arrangements.	<p>A party to a commercial lease <u>to which an Impacted Lessee is a party (not expressly limited to an Impacted Lessee)</u> may request the other parties to renegotiate the rent payable under, and other terms of, the lease. Those parties must then renegotiate the rent payable and other terms under the lease in good faith.</p> <p><u>An Impacted Lessee must give the lessor:</u></p> <ul style="list-style-type: none"> <u>a statement to the effect that the lessee is an Impacted Lessee; and</u> <u>evidence that the lessee is an Impacted Lessee.</u> <p><u>Note: The above changes pursuant to the NSW Amendment extend to renegotiations that have commenced but not been completed before commencement of the NSW Amendment (on 3 July 2020) but do not extend to a matter for which proceedings have been commenced.</u></p>	<p>Following receipt of a request from a Tenant (Tenant Request), and offer of rent relief by Landlord, parties must negotiate in good faith.</p> <p>A Tenant Request must be in writing, and accompanied by a statement that:</p> <ul style="list-style-type: none"> the Tenant's lease is an eligible lease; and the Tenant is an SME entity and qualifies for, and is a participant in, the JobKeeper scheme. 	<p>A party to an affected lease may, in writing, ask another party to the lease to negotiate the rent payable under, and other stated conditions of, the lease.</p> <p>After a request is made, the parties must, as soon as practicable, exchange information relating to the request that is correct and sufficient to enable the lessor to make an offer and then the parties to negotiate in a fair and transparent manner.</p>

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Reductions/waivers of other payments (Principles #6, #7, #8)	<p>Any reduction in statutory charges or insurance, or any benefit the Landlord receives due to the deferral of loan repayments, must be proportionately passed on/shared with the SME Tenant.</p> <p>Landlords should seek to waive recovery of any other expense.</p>	<p>An Impacted Lessee is to benefit from any reductions in land tax, statutory charges or insurance costs payable by the Lessor.</p>	<p>Landlord must consider waiving recovery of any outgoing or other expense. If Tenant is not able to operate their business, Landlord may acting reasonably or as reasonably requested by Tenant, cease to provide, or reduce provision of any service.</p> <p>If any outgoings charged, imposed or levied are reduced:</p> <ul style="list-style-type: none"> ▪ Tenant not required to pay any amount that is greater than a Tenant's proportional share of the reduced outgoing payable; ▪ If Tenant has or does pay such excess amount, Landlord must reimburse that excess to Tenant as soon as possible. 	<p>In offering the Lessee a reduction in the amount payable under the lease, the offer must have regard to any reduction in, or waiver of, the amount payable in relation to applicable amounts in the lease for land tax, local government rates, statutory charges, insurance premiums or other outgoings.</p> <p>There is no explicit obligation to waive the recovery of outgoings or to proportionately reduce the lessee's outgoings by the amount of any waiver or other reduction provided by the Lessor.</p>
Recourse to Lease Security (Principle #11)	<p>Landlord must not draw on an SME Tenant's security for the non-payment of rent during the Period and/or a reasonable subsequent recovery period.</p>	<p>If a lessee is an Impacted Lessee, the Lessor cannot recover the whole or part of a security bond, a guarantor or bank guarantee if there is any failure to pay rent or outgoings, or the business operating under the lease fails to operate for business during hours specified in the lease.</p>	<p>Landlord cannot (or attempt to) have recourse to any security relating to the non-payment of rent.</p>	<p>Lessor cannot recover a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings that arise in the response period.</p>
Other rights/obligations (Principles #2, # 9, #14)	<p>SME Tenants must remain committed to the terms of their lease. Material failure to abide by substantive terms of their lease will forfeit any protections provided to SME Tenants under this National Code.</p>	<p>If a lessee is an Impacted Lessee, certain other prescribed actions cannot be taken by the Lessor for non-payment of rent or outgoings, or failure to operate business during hours specified in lease:</p> <ul style="list-style-type: none"> ▪ claim damages; 	<p>General Obligations</p> <ul style="list-style-type: none"> ▪ Landlords and Tenants must cooperate and act reasonably and in good faith in all relevant discussions and actions; ▪ parties must not divulge or communicate protected 	<p>General Obligations</p> <p>Lessors and Lessees must cooperate and act reasonably and in good faith in all discussions and actions relating to mitigating the effect of the COVID-19 emergency on the parties to the lease.</p> <p>A Lessor under an affected lease must not take a prescribed action on any of the</p>

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	Landlords may not apply any prohibition or levy any penalties if SME Tenant reduces opening hours/ceases trade.	<ul style="list-style-type: none"> require performance of obligations by the Impacted Lessee or any other person under a guarantee under the lease; claim any other remedy otherwise available to the Lessor. 	<p>information obtained in connection with the Regulations.</p> <p>Landlord rights</p> <p>Landlord may give the statement and information it has received under a Tenant Request to the Commissioner of State Revenue when applying for a tax relief measure in relation to any tax paid or required to be paid by the Landlord in relation to the premises.</p> <p>Tenant rights</p> <p>If a Tenant's financial circumstances materially change after an agreed variation to a lease, the Tenant may make a further request for rent relief or terms variation.</p>	<p>following grounds, occurring wholly or partly during the response period:</p> <ul style="list-style-type: none"> failure to pay rent; failure to pay outgoings; and the business carried on at the leased premises not being open for business during the hours required under the lease during the response period. <p>Confidentiality obligations apply to the information disclosed as a result of the Regulation.</p> <p>Any party may seek to negotiate a further reduction in rent during the Regulation Period if a ground on which the renegotiation was based changes in a material way. In such circumstances, the renegotiation process will recommence and this time it is possible to negotiate an increase in rent, and the lessor's revised offer can include a rent waiver of less than 50%.</p>

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Dispute Resolution	<p>Applicable state or territory retail/commercial leasing dispute resolution processes for binding mediation.</p> <p>Parties are not to use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.</p>	<p>Retail Leases: Dealt with under the <i>Retail Leases Act 1994</i> as if they were retail tenancy disputes under the Act.</p> <p>Commercial (non-retail) leases: Dealt with by the Small Business Commissioner for mediation. Commissioner must certify that mediation has failed and given reasons for the failure before Court proceedings can take place.</p> <p><u>Note: The above changes pursuant to the NSW Amendment extend to renegotiations that have commenced but not been completed before commencement of the NSW Amendment (on 3 July 2020) but do not extend to a matter for which proceedings have been commenced.</u></p>	<p>Parties may refer a dispute to the Small Business Commission for mediation at which the parties may have legal representation. The Small Business Commissioner will not compel an outcome.</p> <p>Disputes may only be the subject of a proceeding in Victorian Civil and Administrative tribunal or a court if the Small Business Commission has certified in writing that mediation has failed, or is unlikely to resolve the dispute.</p>	<p>The parties must attempt to resolve the dispute prior to starting mediation. Disputes are then intended to be referred to the new temporary Small Business Commissioner, who will refer the parties to mediation. The Small Business Commissioner will not compel an outcome. If mediation fails, and in other limited circumstances, the parties may proceed to QCAT or to a court with the required jurisdiction.</p> <p>Stays or suspensions are applicable to proceedings or actions that were under way before the Regulations were released on 28 May 2020, and existing retail disputes can continue to be resolved under the existing retail leasing legislation.</p> <p>The Regulation does provide for alternative dispute resolution processes such as arbitration, if desired by the parties.</p>

For further information or to discuss your particular circumstances or practical applications of the above principles, please contact any of our Commercial Real Estate team who are continuing to work closely with our Landlord and Tenant clients in this space.



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