

NSW IMPLEMENTATION OF THE NATIONAL CODE OF CONDUCT FOR COMMERCIAL LEASES

Q AND A

Why is the NSW Government taking action?

The NSW Government is implementing the Code of Conduct announced by the Prime Minister on 7 April 2020 to support commercial tenants in financial distress due to the impacts of COVID-19.

We want to share the economic impact of COVID-19 across landlords and tenants, to make things fairer.

We are seeking to maximise the number of businesses that can resume normal operation when this is all over.

We want to keep businesses in business so they can rebound and support jobs and the economy in the future.

How will the NSW Government implement the National Code of Conduct?

On 24 April 2020, the NSW Government enacted the Retail and Other Commercial Leases (COVID-19) Regulation 2020 to implement the Code of Conduct.

Key features of the Regulation are outlined below.

Rent reduction

Eligible commercial tenants can ask their landlord to renegotiate rent and other terms of the lease. Negotiations between tenants and landlords must be had in good faith and have regard to:

- The economic impact of the COVID-19 pandemic.
- The leasing principles in the Code of Conduct. These include principles 3, 4 and 5 that refer to rent reduction and apply on a case by case basis:
 - **Principle 3:** Landlords must offer reductions in rent (in the form of deferrals and waivers) proportionate to the tenant's decline in turnover
 - **Principle 4:** Rent waivers (as opposed to deferrals) must constitute at least 50 per cent of the rent reduction
 - **Principle 5:** Any deferred rent must be paid back over the balance of the lease term or for a period of no less than 24 months, whichever is greater.

The 14 leasing principles of the Code should be **applied on a case-by-case basis**. Landlords and tenants can opt out of any, or all, of the principles and reach their own agreement provided **both parties agree**.

Other relief

Landlords of eligible commercial tenants cannot (unless agreed otherwise by **both** landlord and tenant):

- Evict a tenant for non-payment of rent or outgoings.
- Evict a tenant because the business is not open during the hours specified in the lease
- Recover a security bond or guarantee for non-payment of rent or outgoing
- Increase a tenant's rent
- Charge interest or fees on any unpaid rent.

In addition, if an eligible tenant is required to contribute towards land tax or any other statutory charge or insurance payable by the landlord and this outgoing is reduced, the tenant is exempt from paying the reduced amount.

To receive the protections under the Code of Conduct, tenants must remain committed to the terms of the lease, including any renegotiated terms.

Which commercial tenants are eligible for support?

These measures apply to commercial (retail, office and industrial) tenants that:

- Had an annual turnover less than \$50 million in 2018-19
- Have experienced at least a 30 per cent decline in turnover, compared with a corresponding month or quarter in 2019.

Not for profit organisations only need to demonstrate a 15 per cent decline in turnover, compared with a corresponding month or quarter in 2019.

The eligible entity and decline in turnover tests are the same as the tests for JobKeeper.

The \$50 million annual turnover threshold applies to franchises at the franchisee level, and to retail corporate groups at the group level (rather than at the individual retail outlet level).

When do these measures apply from and how long will they last?

The NSW Regulation applies from 24 April 2020 for a period of six months.

These measures will be reviewed regularly as the COVID-19 pandemic has created a rapidly changing environment, and the NSW Government must ensure the rules continue to be appropriate.

What are the Leasing Principles in the Code of Conduct?

In renegotiating rent, landlords and eligible tenants must have regard to the leasing principles in the Code of Conduct.

Landlords and tenants can, however, **jointly agree** on alternate arrangements depending on their individual circumstances.

Code of Conduct 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 of up to 100 per cent 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 per cent 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 per cent 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.

What rent reduction must landlords provide?

Under the NSW Regulation, landlords must renegotiate rent with eligible tenants in good faith having regard to the leasing principles in Code of Conduct.

Under the leasing principles, landlords must reduce rent in proportion to the tenant's decline in turnover. This means if a tenant has experienced a 40 per cent decline in turnover due to COVID-19, then the landlord must provide a 40 per cent reduction in rent.

As a default position, at least 50 per cent of any rent reduction must be in the form of a rent waiver with the remainder a rent deferral. Any deferred rent must be paid back over the balance of the lease term or for a period of no less than 24 months, whichever is greater.

Everyone's situation is different and so tenants and landlords will be free to agree upon alternative arrangements that work for them, but the Code of Conduct leasing principles should be the starting point.

Why is the NSW Government being prescriptive about rent reduction?

This is the framework agreed to by National Cabinet and announced by the Prime Minister on 7 April.

Individual landlords and tenants would normally negotiate their own lease arrangements. However, due to the unprecedented nature of the COVID-19 pandemic, government has acted to provide a minimum level of protection for tenants.

Parties are free to adopt alternative arrangements that work for them, provided **both** landlord and tenant agree to these arrangements.

Is this unfair for landlords, particularly mum and dad investors who may have a mortgage to pay and no rent coming in?

We understand the package could place additional pressure on landlords, however, we are trying to share the load more evenly during these challenging times. We encourage landlords with loans to contact their banks for additional relief arrangements.

How do I demonstrate to my landlord that I am eligible?

To be eligible, tenants must provide landlords with:

- Evidence of eligibility for JobKeeper (or evidence of at least a 30 per cent decline in turnover if the business is not receiving JobKeeper); and
- Tax returns and/or Business Activity Statements to demonstrate an annual turnover less than \$50 million in 2018-19.

Tenants must also provide landlords with sufficient documentation to demonstrate actual decline in order to calculate rent reduction. Landlords should act reasonably and not place onerous requests on tenants for documentation.

Landlords must treat information provided by tenants as confidential, and use the information only for the purpose of complying with the NSW Regulation.

If I am eligible for JobKeeper am I covered by these measures?

Yes, provided the business had an annual turnover of less than \$50 million in 2018-19.

All my staff are casuals of less than 12-months standing, so I don't get JobKeeper, is my business still covered by these measures?

The Regulation states a business must meet the *eligible entity* and *decline in turnover* tests for JobKeeper.

In summary, if the business had an annual turnover of less than \$50 million in 2018--19 and has experienced at least a 30 per cent decline in turnover, then it is

covered by the provisions, regardless of whether it is actually eligible for or receiving JobKeeper.

Certain businesses are excluded from the provisions under the eligible entity test for JobKeeper, including foreign governments and their agencies, local governments and wholly-owned corporations of these bodies, and companies for which a liquidator has been appointed.

What tax relief is available?

Commercial landlords that provide rent relief to eligible tenants will be entitled to land tax relief of equivalent value, up to a maximum of 25 per cent of their land tax liability for 2020 on the relevant property.

Landlords will receive a waiver on land tax if they are yet to pay, or a rebate of previously paid land tax.

Landlords that receive this tax concession will also be able to defer their remaining land tax payments for three months.

What does it mean to enter into “mediation” to renegotiate rent?

Commercial landlords and eligible tenants should work together to renegotiate rent and other lease terms.

It is in the interests of all parties to negotiate a mutually beneficial outcome.

Where parties are unable to do this, they must attend mediation through the Small Business Commission, before any further action is taken.

The mediator cannot impose any outcome but, if a mediation is successful, parties can enter a binding deed.

What are the penalties for a landlord who breaks any of these new rules?

If commercial landlords breach their obligations under the NSW Regulation, the tenant must seek mediation in the first instance through the NSW Small Business Commission.

Where the landlord and tenant are unable to reach an agreement through this process, the parties will be able to pursue action through the NSW Civil and Administrative Tribunal or the civil courts.

Who does a tenant complain to if the landlord wants to evict and not provide rent relief?

In the first instance, the tenant should contact Service NSW for advice on next steps.

The Small Business Commission’s mediation service can support landlords and tenants to resolve disputes in a cost-effective and non-adversarial way.

It is compulsory for parties to a commercial lease to undertake mediation before pursuing a claim in the NSW Civil and Administrative Tribunal (NCAT) or the civil courts.

For an urgent matters involving a threatened or actual eviction, interim arrangements can be sought through NCAT or the courts.

Are there any circumstances in which a landlord can evict a tenant from a commercial premise?

A landlord can still evict a tenant for reasons not related to COVID-19, for example if the tenant has damaged the premises or failed to vacate the premises after the expiry of a fixed term lease.

Do the measures cover holdover leases or new leases?

The measures cover holdover leases, but do not cover new leases entered into after 24 April 2020.

Where can I get more information?

For more information about these measures, contact Service NSW 24/7 on 13 77 88 or through the dedicated COVID-19 website.