

# NSW implementation of National Code of Conduct for Commercial Leases

Why is the NSW Government taking action?

Efforts to contain the spread of the COVID-19 pandemic are negatively impacting many businesses. The NSW Government has enacted regulation to implement National Cabinet's Code of Conduct for commercial tenancies ("the Code of Conduct"). It puts in place temporary measures to share the economic impacts of COVID-19 between commercial landlords and tenants, to maximise the number of businesses that can resume operation when public health orders are lifted.

These measures apply for **an initial period of six months, commencing 24 April 2020**.

What support is available to commercial tenants?

## *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 14 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 in the Code of Conduct 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 parties**):

- 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.

Who do these measures apply to?

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

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

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 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).

What evidence is needed to show eligibility?

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 turnover 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 renegotiating rent and other lease terms.

What happens if an agreement cannot be reached?

In the first instance, commercial landlords and tenants should contact Service NSW for advice on next steps. The Small Business Commission's mediation service can support parties to resolve disputes in a cost-effective and non-adversarial way.

It is compulsory for commercial landlords and tenants to undertake mediation before pursuing a claim in the NSW Civil and Administrative Tribunal (NCAT) or the civil courts. For urgent matters involving a threatened or actual eviction, interim arrangements can be sought through NCAT or the courts.

What tax relief is available?

Landlords that provide rent relief to eligible tenants will be eligible for land tax relief of an 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.

How can I get more information?

For more information about this package, refer to the Frequently Asked Questions document, or contact Service NSW 24/7 on 13 77 88 or through the dedicated COVID-19 website.