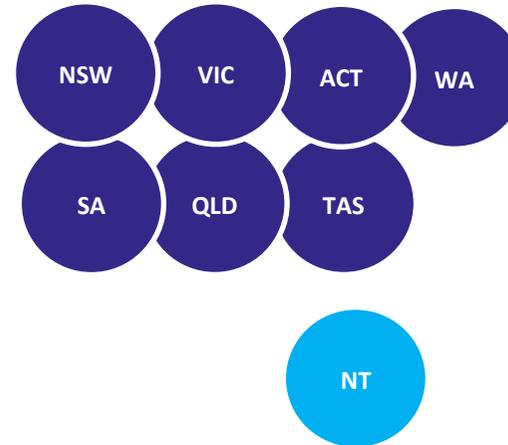
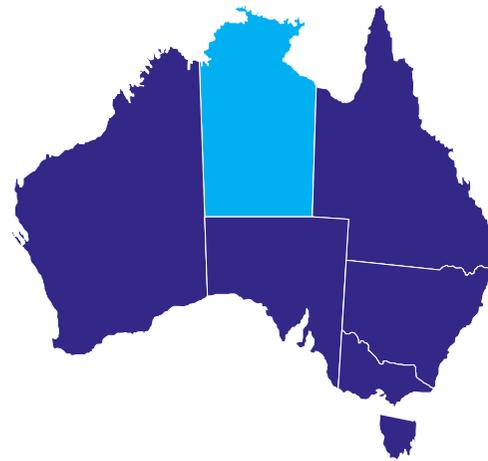


Mandatory Code of Conduct for Commercial Leases – Implementation

17 July 2020

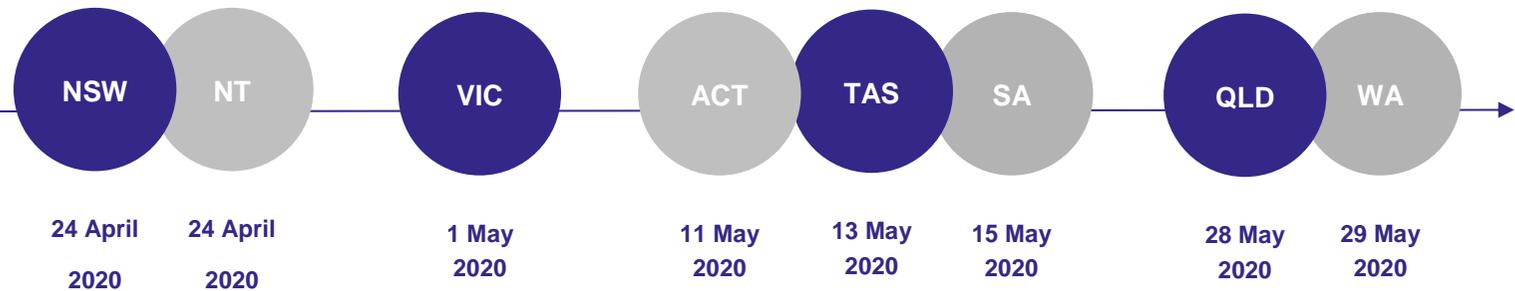
On 7 April, the National Cabinet announced a Mandatory Code of Conduct for COVID-19 impacted small and medium sized commercial tenants (**Mandatory Code**).

The Mandatory Code was developed to enable a consistent national approach, and each State and Territory has now introduced legislation giving it effect.



Full implementation

Partial implementation



Jurisdiction	National	NSW	Victoria	Queensland	WA	ACT	South Australia	NT	Tasmania
Legislation	Mandatory Code <i>National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19</i>	<i>Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)</i> <i>Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2020 (NSW)</i>	<i>COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)</i> <i>COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 (Vic)</i>	<i>COVID-19 Emergency Response Act 2020 (Qld)</i> <i>Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (Qld)</i>	<i>Commercial Tenancies (COVID-19 Response) Act 2020 (WA)</i> <i>Commercial Tenancies (COVID-19 Response) Regulations 2020 (WA)</i>	<i>Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (ACT)</i>	<i>COVID-19 Emergency Response Act 2020 (SA)</i> <i>COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020 (SA)</i>	<i>Tenancies Legislation Amendment Act 2020 (NT)</i> <i>Business Tenancies COVID-19 Modification Notice 2020 (S27)</i>	<i>COVID-19 Disease Emergency (Commercial Leases) Act 2020 (Tas)</i> <i>COVID-19 Disease Emergency (Commercial Leases) Regulations 2020 (Tas)</i> <i>Proclamation under the COVID-19 Disease Emergency (Commercial Leases) Act 2020 (Tas)</i>
Period	COVID-19 Period The period during which the federal Jobkeeper program is operational (currently due to end on 28 March 2021), with some obligations applying during a reasonable recovery period thereafter.	Prescribed Period 24 April – 24 October 2020	Relevant Period 29 March – 29 September 2020	Response Period 29 March – 30 September 2020	Emergency Period 30 March – 29 September 2020	Prescribed Period 1 April 2020 until the later of: <ul style="list-style-type: none"> the end of the COVID-19 state of emergency declared in the ACT; or any later day notified by the Minister (must not be more than 3 months later). 	Prescribed Period 30 March – 30 September 2020	Emergency Period The period during which the COVID-19 public health emergency is declared in the NT (the public health emergency was declared on 18 March and has been extended to 23 September 2020).	Financial Hardship Period 1 April 2020 – 1 April 2021 (or sooner if determined by the Treasurer that the COVID-19 effects have been significantly reduced).

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Eligibility	<p>SME tenants</p> <p>Applies to all tenancies where the tenant:</p> <ul style="list-style-type: none"> qualifies for Jobkeeper (30% fall in revenue since 1 March); and has an annual turnover less than \$50 million (measured at franchisee level for franchises and group level for retail corporate groups). <p>Applies in spirit to all leases for affected businesses, having fair regard to size and financial structure.</p>	<p>Impacted Lessees</p> <p>Applies to commercial leases entered before 24 April 2020 where the tenant:</p> <ul style="list-style-type: none"> qualifies for Jobkeeper; and had a turnover less than \$50 million in the 2018/2019 financial year (measured at franchisee level for franchises and group level for corporate groups). 	<p>Eligible Leases</p> <p>Applies to commercial leases in effect on 29 March 2020 where the tenant:</p> <ul style="list-style-type: none"> qualifies for and is a participant in Jobkeeper; and has an anticipated turnover in the current financial year or had an actual turnover in the previous financial year less than \$50 million (measured at the group level for corporate groups). 	<p>Affected Leases</p> <p>Applies to commercial leases in effect on 28 May 2020 where the tenant:</p> <ul style="list-style-type: none"> qualifies for Jobkeeper or satisfies the Jobkeeper turnover test; and has an anticipated turnover in the current financial year or had an actual turnover in the previous financial year less than \$50 million (measured at the group level for corporate groups). 	<p>Eligible Tenants</p> <p>Applies to small commercial leases where the tenant:</p> <ul style="list-style-type: none"> qualifies for Jobkeeper, or can prove a 30% reduction in turnover due to COVID-19 compared with a similar period in 2019; and had a turnover less than \$50 million in the 2018/2019 financial year (measured at franchisee level for franchises and group level for corporate groups). 	<p>Impacted Tenants</p> <p>Applies to commercial leases entered before 7 April 2020 where the tenant:</p> <ul style="list-style-type: none"> qualifies for Jobkeeper; and had a turnover less than \$50 million in the 2018/2019 financial year (measured at franchisee level for franchises and group level for corporate groups). 	<p>Affected Lessees</p> <p>Applies to commercial leases entered before 30 March 2020 where the tenant:</p> <ul style="list-style-type: none"> is suffering financial hardship (established if the tenant qualifies for is or receiving Jobkeeper); and had a turnover less than \$50 million in the 2018/2019 financial year (measured at franchisee level for franchises and group level for corporate groups). <p>However, some provisions apply to all commercial leases.</p>	<p>Business Leases and Occupation Arrangements</p> <p>The Minister may make a modification notice in relation to a business lease (being a lease of business premises) or an occupation arrangement (being an arrangement for the occupation or premises for business purposes).</p>	<p>Protected Leases</p> <p>Applies to commercial leases where the tenant:</p> <ul style="list-style-type: none"> qualifies for Jobkeeper; and has an anticipated turnover less than \$50 million in the current financial year or had an actual turnover less than \$50 million in the previous financial year (measured at group level for corporate groups).

Jurisdiction	National	NSW	Victoria	Queensland	WA	ACT	South Australia	NT	Tasmania
Rent relief	Landlords must reduce rent proportionately to decline in tenant's business, measured by the reduction in turnover, through a combination of rent waivers and deferrals.	<p>Either party may initiate rent negotiations, with the tenant being required to provide evidence that it is an Impacted Lessee.</p> <p>The parties are required to renegotiate the rent payable, and other lease terms, in good faith, having regard to the economic impacts of COVID-19 and the leasing principles in the Mandatory Code.</p>	<p>Tenants may submit a request for rent relief accompanied by evidence that the lease is an Eligible Lease.</p> <p>Rent relief must be offered by landlords within 14 days (unless otherwise agreed), taking account of:</p> <ul style="list-style-type: none"> the reduction in tenant's turnover; the ability of the tenant to fulfil its lease obligations; any reduction or waiver of outgoings; and the financial ability of the landlord. <p>The parties must negotiate the rent payable and other lease terms in good faith.</p>	<p>Either party may initiate rent negotiations.</p> <p>Tenants must provide evidence that they are an Affected Lessee.</p> <p>Rent relief must then be offered by landlords within 30 days, taking account of:</p> <ul style="list-style-type: none"> the reduction in tenant's turnover; the ability of the tenant to fulfil its lease obligations; any reduction or waiver of outgoings; and the financial ability of the landlord. <p>The parties must negotiate the rent payable in good faith.</p>	<p>Tenants may submit a request for rent relief accompanied by evidence that the tenant is an Eligible Tenant.</p> <p>Rent relief must then be offered by landlords within 14 days (unless otherwise agreed).</p> <p>Rent relief offered by the landlord must be at least proportionate to the reduction in turnover experienced by the tenant during the Emergency Period.</p> <p>The parties must negotiate the rent payable in good faith.</p> <p>Tenants may initiate a repeat of this process if they experience a material change in their financial circumstances.</p>	<p>There is no express entitlement to rent relief.</p> <p>However, landlords are required to negotiate with tenants in good faith having regard to the principles in the Mandatory Code before taking any prescribed action or issuing a termination notice.</p>	<p>The parties must make a genuine attempt to negotiate the rent payable and other lease terms in good faith, having regard to:</p> <ul style="list-style-type: none"> the economic impacts of COVID-19 on <i>both</i> parties; and the leasing principles in the Mandatory Code. <p>Third parties such as guarantors and mortgagees must be involved in negotiations.</p>	<p>There is no express entitlement to rent relief.</p>	<p>Either party may initiate rent negotiations.</p> <p>The parties must negotiate the rent payable in good faith, having regard to:</p> <ul style="list-style-type: none"> the economic impacts of COVID-19 on <i>both</i> parties; and the leasing principles in the Mandatory Code. <p>Either party may initiate a repeat of this process but not within 3 months of the end of a previous rent negotiation (unless otherwise agreed).</p>

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			Tenants may initiate a repeat of this process if they experience a material change in their financial circumstances.	Either party may initiate a repeat of this process if a ground on which the initial rent relief was based changes in a material way.					
Rent waiver	Rent waivers must account for at least 50% of any rent relief (unless waived by the tenant) and should make up a higher proportion where the tenant would otherwise be unable to fulfil their lease obligations, having regard to the financial ability of the landlord.	There is no express requirement for 50% of rent relief to be made up of rent waivers. However, parties are required to negotiate the rent payable in good faith having regard to the principles in the Mandatory Code.	Rent waivers must account for at least 50% of any rent relief (unless otherwise agreed). Further rent relief need not include a further 50% waiver.	Rent waivers must account for at least 50% of any rent relief. Further rent relief need not include a further 50% waiver.	Rent waivers must account for at least 50% of any rent relief (unless otherwise agreed). Landlords must provide more than 50% of rent relief as rent waivers if: <ul style="list-style-type: none"> failure to do so would compromise the ability of the tenant to fulfil its lease obligations; and the landlord has the financial ability to do so. 	There is no express entitlement to rent relief. However, landlords are required to negotiate with tenants in good faith having regard to the principles in the Mandatory Code before taking any prescribed action or issuing a termination notice.	There is no express requirement for 50% of rent relief to be made up of rent waivers. However, parties are required to negotiate the rent payable in good faith having regard to the principles in the Mandatory Code.	There is no express entitlement to rent relief.	There is no express requirement for 50% of rent relief to be made up of rent waivers. However, parties are required to negotiate the rent payable in good faith having regard to the principles in the Mandatory Code.

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Repayment	<p>Rent deferrals must be repayable over the greater of:</p> <ul style="list-style-type: none"> the balance of the lease term; or 24 months after the COVID-19 Period and a reasonable recovery period. <p>Landlords should offer tenants a lease extension equivalent to the rent waiver and deferral period.</p>	<p>There is no mandatory minimum repayment period for deferred rent.</p> <p>However, parties are required to negotiate the rent payable in good faith having regard to the principles in the Mandatory Code.</p>	<p>Rent deferrals must be repayable over the greater of:</p> <ul style="list-style-type: none"> the balance of the lease term, including extensions; or 24 months, commencing after the end of the Relevant Period or lease expiry, whichever is earlier (unless otherwise agreed). <p>Landlords must offer tenants a lease extension equivalent to the rent deferral period (unless otherwise agreed).</p>	<p>Rent deferrals must be repayable over 2 – 3 years commencing after the end of the Response Period.</p> <p>Landlords must offer tenants a lease extension equivalent to the rent waiver and deferral period.</p>	<p>Rent deferrals must be repayable over the greater of:</p> <ul style="list-style-type: none"> the balance of the lease term; or 24 months, commencing after the end of the Emergency Period or lease expiry, whichever is earlier (unless otherwise agreed). <p>Landlords must offer tenants a lease extension equivalent to the rent waiver or deferral period unless otherwise agreed, or if doing so would be inconsistent with pre-existing third party rights.</p>	<p>There is no mandatory minimum repayment period for deferred rent.</p> <p>However, landlords are required to negotiate with tenants in good faith having regard to the principles in the Mandatory Code before taking any prescribed action or issuing a termination notice.</p>	<p>There is no mandatory minimum repayment period for deferred rent.</p> <p>However, parties are required to negotiate the rent payable in good faith having regard to the principles in the Mandatory Code.</p>	<p>There is no express entitlement to rent relief.</p>	<p>There is no mandatory minimum repayment period for deferred rent.</p> <p>However, parties are required to negotiate the rent payable in good faith having regard to the principles in the Mandatory Code.</p> <p>Landlords must offer tenants a lease extension until the end of the Financial Hardship Period (or a longer period agreed by the parties) unless the landlord has agreed to re-lease the premises or intends to occupy the premises upon lease expiry.</p>

Jurisdiction	National	NSW	Victoria	Queensland	WA	ACT	South Australia	NT	Tasmania
Outgoings	<p>If there has been a reduction of the land tax, council rates, or insurance costs payable by a landlord, that landlord must pass a proportion of those savings on to the tenant as required by the terms of the lease.</p> <p>Landlords should seek to waive recovery of any other expense or outgoing payable by the tenant while the tenant is unable to trade.</p>	<p>If the tenant is required to pay a fixed amount in relation to statutory charges or insurance payable by the landlord, and those charges are reduced, the amount payable by the tenant must be reduced in a corresponding manner.</p>	<p>Landlords must consider waiving recovery of any outgoing or other expense payable by a tenant while the tenant is unable to trade.</p> <p>Landlords must pass the benefit of any reduction in outgoings on to the tenant and must reimburse any outgoings already paid by the tenant during the Relevant Period that did not account for the reduction.</p> <p>Landlords may cease or reduce providing services at the premises while the tenant is unable to trade.</p>	<p>There is no express entitlement to a reduction in outgoings payable by the tenant.</p> <p>The landlord may cease or reduce provision of services at the premises while the tenant is unable to trade.</p>	<p>Landlords must consider waiving the recovery of outgoings payable by tenants who have been unable to trade during the Emergency Period.</p> <p>Landlords must pass the benefit of any reduction in outgoings on to the tenant and must reimburse any outgoings already paid by the tenant during the Emergency Period that did not account for the reduction.</p> <p>Landlords may cease or reduce providing services at the premises while the tenant is unable to trade.</p>	<p>There is no express entitlement to a reduction in outgoings payable by the tenant.</p> <p>However, landlords are required to negotiate with tenants in good faith having regard to the principles in the Mandatory Code before taking any prescribed action or issuing a termination notice.</p>	<p>Landlords must not require tenants to pay land tax or reimburse land tax paid by the landlord.</p> <p>Landlords must pass the benefit of any reduction or waiver of land tax on to the tenant.</p> <p>There is no express entitlement to a reduction in other outgoings payable by the tenant.</p> <p>However, parties are required to negotiate the lease terms in good faith having regard to the principles in the Mandatory Code.</p>	<p>There is no express entitlement to a reduction in outgoings payable by the tenant.</p>	<p>If the tenant is required to pay a fixed amount in relation to statutory charges or insurance payable by the landlord, and those charges are reduced, the amount payable by the tenant must be reduced in a corresponding manner (unless otherwise agreed).</p>
Restrictions on landlord conduct	<p>Landlords must not:</p> <ul style="list-style-type: none"> impose rent increases (except in the case of retail) 	<p>Landlords must not:</p> <ul style="list-style-type: none"> impose rent increases; take any prescribed 	<p>Landlords must not:</p> <ul style="list-style-type: none"> impose rent increases (unless 	<p>Landlords must not:</p> <ul style="list-style-type: none"> impose rent increases; take any prescribed 	<p>Landlords must not:</p> <ul style="list-style-type: none"> impose rent increases; take any prohibited 	<p>Landlords must not:</p> <ul style="list-style-type: none"> issue a termination notice; or 	<p>Landlords must not:</p> <ul style="list-style-type: none"> impose rent increases (unless 	<p>Landlords must not:</p> <ul style="list-style-type: none"> give a tenant a notice to quit unless they have, for 	<p>Landlords must not:</p> <ul style="list-style-type: none"> impose rent increases (except in the case of retail)

Jurisdiction	National	NSW	Victoria	Queensland	WA	ACT	South Australia	NT	Tasmania
	<p>turnover rent);</p> <ul style="list-style-type: none"> • terminate leases or draw on tenant securities for non-payment of rent; • impose penalties for the tenant reducing trading hours or ceasing trading; or • charge interest on any unpaid rent. 	<p>action (including termination, eviction, drawing on securities, claiming damages, charging interest on unpaid rent) for non-payment of rent (unless the landlord has engaged in good faith negotiations with the tenant in relation to the rent payable) or outgoing, or the tenant reducing trading hours or ceasing trading.</p> <p>Landlords are not prevented from taking a prescribed action on grounds not related to the economic impacts of COVID-19.</p>	<p>otherwise agreed);</p> <ul style="list-style-type: none"> • evict tenants, re-enter or recover premises, or draw on tenant securities for non-payment of rent (unless the tenant has not complied with its rent negotiation obligations) or for the tenant reducing trading hours or ceasing trading; • charge interest on any unpaid rent. 	<p>action (including termination, eviction, re-entry or recovery, drawing on tenant securities, claiming damages, charging interest on unpaid rent) for non-payment of rent or outgoing, or the tenant reducing trading hours or ceasing trading, unless otherwise agreed, unrelated to COVID-19, or where the tenant has substantially failed to negotiate in good faith despite a genuine</p>	<p>action (including termination, eviction, re-entry or recovery, drawing on tenant securities, claiming damages, charging interest on unpaid rent) for non-payment of rent or outgoing, or the tenant reducing trading hours or ceasing trading.</p>	<ul style="list-style-type: none"> • take any prescribed action (including eviction, re-entry or recovery, drawing on tenant securities, claiming damages, charging interest on unpaid rent) for non-payment of rent or outgoing, or the tenant reducing trading hours or ceasing trading, unless the landlord has engaged in good faith negotiations with the tenant. 	<p>otherwise agreed); or</p> <ul style="list-style-type: none"> • take any prescribed action (including termination, eviction, re-entry or recovery, drawing on tenant securities, claiming damages, charging interest on unpaid rent) for non-payment of rent or outgoing, or the tenant reducing trading hours or ceasing trading. 	<p>at least 30 days, negotiated with the tenant in good faith to allow the tenant to remain in the premises; or</p> <ul style="list-style-type: none"> • intentionally misrepresent their financial situation in the course of negotiations relating to the terms of a business lease or occupation arrangement during the Emergency Period. 	<p>turnover rent);</p> <ul style="list-style-type: none"> • take any prescribed lessor action (including termination, eviction, re-entry or recovery, drawing on tenant securities, claiming damages, charging interest on unpaid rent) for non-payment of rent or outgoing, or the tenant reducing trading hours or ceasing trading; • impose penalties for the tenant reducing trading hours or ceasing trading; or • engage in misleading or

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				attempt by the landlord; <ul style="list-style-type: none"> charge interest on any unpaid or deferred rent. 					deceptive conduct.

Further information

For further detail on the position under the Mandatory Code, and in each jurisdiction, please refer to our State and Territory specific alerts:

<p>Mandatory Code Click to see article.</p>  <p>Mandatory Code of Conduct for commercial leases: what does it mean for you?</p>	<p>New South Wales Click to see article.</p>  <p>National Code of Conduct for commercial leases – New South Wales’ mandatory regime comes into force</p>	<p>Victoria Click to see article.</p>  <p>Victoria implements its version of the National Code for commercial leases</p>	<p>Queensland Click to see article.</p>  <p>Queensland implements its version of the national code for commercial leases</p>	<p>Western Australia Click to see article.</p>  <p>Western Australia implements its version of the national code for commercial leases</p>	<p>ACT Click to see article.</p>  <p>National Code of Conduct for commercial leases The ACT scheme arrives</p>	<p>South Australia Click to see article.</p>  <p>South Australia introduces Regulations giving effect to the National Code for commercial leases</p>
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