

ACT Commercial tenancies code of conduct explained

10 September 2020

Frequently asked questions about the commercial tenancies code of conduct in Australian Capital Territory

Background and National Code

On 7 April 2020, Prime Minister Scott Morrison announced an industry code of conduct (National Code) to address the financial impact of COVID-19 on commercial (including retail, office and logistics) tenancies. Each state and territory was tasked with legislating the National Code as appropriate.

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Frequently Asked Questions

State and territory legislation

1. How has the National Code been adopted into ACT law?

On 8 April 2020, the *COVID-19 Emergency Response Act 2020* (ACT) commenced, introducing a new section 177 of the *Leases (Commercial and Retail) Act 2001* (ACT) (**Leases Act**). Section 117 authorises the Minister to make a declaration in relation to:

- prohibiting the termination of a lease to which this Act applies by a landlord in stated circumstances;
- prohibiting the recovery of possession of premises under the lease by the landlord in stated circumstances; changing any period under the lease or this Act in which someone must or may do something;
- changing, limiting or preventing the exercise or enforcement of any other right of the landlord under the lease or this Act in stated circumstances;
- exempting a tenant or landlord, or class of tenant or landlord, from the operation of a provision of this Act, a lease to which this Act applies or any other agreement relating to the lease of the premises,

for the purpose of responding to the public health emergency caused by the COVID0-19 pandemic.

On 11 May 2020, the Australian Capital Territory Attorney-General made *the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020*, giving effect to the National Code in the ACT (**Declaration**). The Declaration is a disallowable instrument under newly introduced section 177 of the *Leases Act*. The Declaration gives effect to the National Code by:

- prohibiting and regulating the exercise of certain rights of landlords relating to the enforcement of certain leases during the COVID-19 pandemic period; and
- requiring, in response to the COVID-19 pandemic, that landlords and tenants negotiate in good faith having regard to the overarching and leasing principles set out in the National Code, before the enforcement of specified rights under certain leases.

2. What are the key issues dealt with in the ACT Declaration?

The Declaration sets out the following key measures:

- the overarching obligation to negotiate in good faith (having regard to the overarching and leasing principles outlined in the National Code); and
- limitations on action that may be taken by landlord against impacted tenants in response to a prescribed breach by the tenant, including:
 - termination;
 - eviction;
 - exercising a right of re-entry;
 - recovery of the premises;
 - distraint of goods on the premises; and
 - seeking payment from impacted tenants (ie- monetary damages, recovery of bonds or payment of penalty charges related to unpaid rent).

Pandemic period

3. When will the Declaration operate?

The Declaration will have effect during the prescribed period which is the period from 1 April 2020 to the end of the COVID-19 emergency or any later day notified by the Minister.

As such, the Declaration will apply to terminations that were initiated in the period between 1 April 2020 and the commencement of the Declaration and have not yet been confirmed by the Magistrates Court.

See: section 3(1) of the Declaration

Eligibility criteria

4. What types of leases are eligible?

A 'prescribed lease' for the purposes of the Declaration is a lease to which the *Leases Act* applies, being leases of the following nature:

- a) retail premises other than large excluded premises;
- b) premises located in the retail area of a shopping centre other than large excluded premises;
- c) small commercial premises;
- d) premises under a lease to an association incorporated under the Associations Incorporation Act 1991, or an entity eligible to be incorporated under that Act, other than premises used for residential purposes;
- e) premises under a lease to an unincorporated charitable entity, other than premises used for residential purposes;
- f) premises under a lease that are used to provide a combination of business accommodation and secretarial services;
- g) premises under a lease that are used as a child care centre;
- h) premises under a lease that are used as a sports centre (other than premises covered by another paragraph);
- i) premises under a lease that are used as an art gallery;
- j) premises under a lease that are used as a gardening supply centre; and
- k) premises prescribed by regulation for this subsection.

See: sections 117(1) and 12(1) of the *Leases Act*

5. Who is an eligible tenant?

An eligible tenant ('impacted tenant') is a tenant under a prescribed lease who:

- entered into a lease before 7 April 2020;
- at any time during the prescribed period qualifies for the Commonwealth Job Keeper scheme; and
- had a turnover for the 2018-2019 financial year of less than \$50 million.

See: section 3(1) of the *Declaration*

6. Does the Declaration apply to licensees who are in reality tenants?

Under the *Leases Act* a lease is defined as including:

- an agreement, whether in writing or not, that provides for the occupation of premises exclusively or otherwise, whether for a fixed term, periodically or at will; and
- a sublease or licence.

As such, the Declaration also applies to licensees who are in reality tenants, so long as those licensees are 'eligible tenants' as defined in the Declaration.

See: section 12 of the *Leases Act*

Definition of turnover and provision of information

7. How is turnover defined?

Turnover is defined under the Declaration as:

- for franchisees, the turnover of the business conducted at the premises or land concerned;
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- for entities that are members of a group (i.e. related bodies corporate), the group turnover; and
 - in any other case, it is the turnover of the business conducted at the premises or land concerned.

Turnover includes internet sales of goods or services.

See: *sections 3(1)(b) and 3(2) of the Declaration*

8. What information or documentation must a tenant provide to the landlord in order to establish a reduction in turnover?

The Declaration does not set out specific documentation requirements.

The National Code provides some guidance as to the documentation to be provided to demonstrate a reduction in turnover. The overarching principles outlined within the National Code include that 'landlords and tenants ... will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code'. The term 'sufficient and accurate information' is defined as including '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'.

The ACT Government Response on Commercial Tenancies – Guidance notes to tenants and lessors (**Guidance Notes**) published in June 2020, provides further clarity, stating that annual business turnover may be established by audited annual accounts or other independently verified information such as ATO tax information.

See: *the National Code and the Guidance Notes*

Confidentiality requirements

9. Are landlords and tenants protected under the Declaration against disclosing financially sensitive information?

The Declaration is silent on whether parties are protected against the disclosure of financially sensitive information.

However, section 129(2) of the *Leases Act*, which applies to leases for premises in the retail areas of shopping centres, specifies that a landlord must not divulge or communicate a tenant's periodic turnover figures to anyone except:

- to the tenant or tenant's guarantor; or
- with the consent of the tenant or the tenant's guarantor; or
- in a document giving aggregate turnover information about a shopping centre or part of a shopping centre in a way that does not disclose information about the turnover of an individual tenant's business; or
- to a court or tribunal, or mediation, a hearing or valuation for this Act; or
- in compliance with a requirement made under this or another law or an order of a court; or (g) to the landlord's professional advisers; or
- to a financial institution to allow the landlord to obtain or continue to receive financial accommodation or to comply with a condition imposed by the financial institution in relation to a financial accommodation; or
- honestly to a prospective purchaser of the shopping centre or part of the shopping centre.

Section 129(3) requires that any person who receives information under section 129 only use the information for the purpose for which it was given and may not further disclose the information except with the tenant's consent.

See: *section 129 of the Leases Act*

Application of Leasing principles

Good faith obligations

10. What is the obligation on a party to act in 'good faith'?

Under the Declaration, 'good faith negotiations' are defined as negotiations in which '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 National Code.'

At general law, a requirement to negotiate in good faith requires the parties to negotiate with a spirit of commercial cooperation and willingness, propriety and honesty. Typically, this will require the parties to:

- disclose material facts (keeping in mind their obligations under section 18 of the *Australian Consumer Law*);
- not provide false information in the course of the negotiations; or
- not frustrate the negotiation process (such as by refusing to meet, or refusing to provide documents) or threaten a future breach of contract.

However, this obligation does not require the parties to ignore their commercial interests or their strict legal rights.

See: section 4 of the Declaration

Rent relief process

11. What is the process for initiating rent relief?

The Declaration does not set out a specific process for initiating rent relief. However, as parties are required to engage in good faith negotiations in the event of a prescribed breach (including a failure by an impacted tenant to pay rent or other moneys due under the lease) the negotiation of rent relief may be raised as a method of ensuring that an impacted tenant is able to comply with its obligations under the lease.

The requirement that landlords and tenants have regard to the overarching and leasing principles outlined in the National Code when engaging in good faith negotiations will direct landlords and tenants to the National Code which provides further guidance as to the extent and period of time for which rent relief should be provided.

See: sections 4, 6, 7 and 8 of the Declaration and leasing principles 3, 4, 5 and 10 of the National Code

12. What factors does a landlord need to take into consideration in making a rent relief offer to a tenant?

While landlords are not required under the Declaration to make a rent relief offer, if, in the process of good faith negotiation, it is determined that a rent relief offer is appropriate, the rent payable, and other terms of the lease, should be renegotiated having regard to:

- the economic impacts of the COVID-19 pandemic; and
- the leasing principles set out in the National Code.

As the Declaration only requires parties to 'have regard' to the National Code's overarching and leasing principles, the following requirements of the National Code should be considered but are not mandatory:

- proportionate rent reductions of up to 100% of the rent payable (in the form of waivers and deferrals);
 - rental waivers no less than 50% of the total rental reduction; and
 - amortisation of deferrals over the balance of the lease term and for no less than 24 months
 - landlords should share the benefits received due to the deferral of loan payments;
 - repayment should occur over an extended period of time;
 - landlords should seek to waive recovery of any other expenses payable;
 - tenants should be able to extend their lease for the equivalent period of any waiver or deferral; and
 - no fees/charges/interest should be applied in respect of rental waivers or deferrals.
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See: section 4 of the Declaration and the National Code

13. What types of relief are covered by 'rent relief'?

The Declaration does not require that landlords provide rent relief. Nonetheless, as stated above, the Declaration requires parties to 'have regard' to the leasing principles set out under the National Code when negotiating in good faith with impacted tenants.

As mentioned above, under the National Code, the leasing principles that deal with rent relief stipulate:

- proportionate rent reductions of up to 100% of the rent payable (in the form of waivers and deferrals);
- rental waivers no less than 50% of the total rental reduction; and
- amortisation of deferrals over the balance of the lease term and for no less than 24 months
- landlords should share the benefits received due to the deferral of loan payments;
- repayment should occur over an extended period of time;
- landlords should seek to waive recovery of any other expenses payable;
- tenants should be able to extend their lease for the equivalent period of any waiver or deferral; and
- no fees/charges/interest should be applied in respect of rental waivers or deferrals.

14. What percentage of the rent relief offered must in the form of a waiver?

As above.

15. Do rent reductions have to be proportionate to the tenant's reduction in trade during the COVID-19 pandemic period?

As above.

16. Do repayments of rental deferrals by the tenant have to be amortised over a certain period?

As above.

Lease extension

17. Do landlords need to offer a lease extension to tenants?

As above.

18. What fees, charges, or interest (if any), can be applied in respect of rental waivers or deferrals?

As above, the Declaration requires parties to 'have regard' to the leasing principles set out under the National Code when negotiating in good faith with impacted tenants. Leasing principle 10 specifies that no fees, interest or other charges should be applied with respect to rent waived in principles 3 and 4 and no fees, charges nor punitive interest may be charged on deferrals in principles 3, 4 and 5.

The definition of prescribed action also explicitly prohibits landlords from requiring the payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a tenant unless it has engaged in good faith negotiations with the tenant.

See: Leasing principle 10 of the National Code and section 8(g) of the Declaration

Pre-agreed rent relief and subsequent rent relief

19. Can a tenant make more than one request for rent relief?

The Declaration is silent on whether a tenant can make more than one request for rent relief.

20. What happens where the landlord and tenant have already agreed on rent relief prior to the Declaration coming into force?

If parties have already agreed to rent relief, it will not be affected insofar as parties are able to negotiate and agree to take any action in relation to a commercial lease (including action that is otherwise prohibited).

Prohibited enforcement actions

21. What actions are landlords prohibited from taking?

Landlords are prohibited from taking 'prescribed action'. Prescribed action means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal for any of the following:

- eviction of the tenant from premises or land under the lease;
- exercise of a right of re-entry to the premises or land;
- recovery of the premises or land;
- distraint of goods on the premises or land;
- forfeiture;
- damages;
- requiring payment of penalty interest on, or a fee or charge related to unpaid rent otherwise payable by the tenant;
- recovery of the whole or part of a security bond under the lease;
- performance of obligations by the tenant or any other person guaranteeing the tenant's obligations under the lease;
- possession of the premises or land;
- any other remedy otherwise available against the tenant under a territory law.

See: section 8 of the Declaration

22. When may a landlord take enforcement action against a tenant?

Under the Declaration, a landlord is prevented from issuing a termination notice or taking any prescribed action against an impacted tenant in relation to a prescribed breach without first engaging in good faith negotiations with the tenant.

The Declaration does not prevent landlords from taking enforcement action that is not a prescribed action or in relation to a breach that is not a prescribed breach.

See: sections 6 and 8 of the Declaration

Arrears

23. What obligation do landlords have to tenants under the Declaration where there are existing (pre COVID-19) arrears or the tenant is in breach of the lease?

If the breach of the lease occurred prior to the prescribed period, it will not constitute a prescribed breach and the landlord will, therefore, not be required to carry out any additional obligations under the Declaration in responding to that breach.

However, if a prescribed breach has occurred and the landlord is seeking to commence a prescribed action or terminate the lease as a result, it will first be required to negotiate in good faith with the tenant, regardless of any pre-existing breach or arrears under the lease.

See: sections 3(1), 6 and 8 of the Declaration

Outgoings

24. Is a landlord required to pass on any reduction in outgoings to the tenant?

The Declaration does not require that landlords pass on any reduction in outgoings to impacted tenants. However, the Declaration requires parties to 'have regard' to the overarching and leasing principles set out under the National Code when negotiating in good faith with impacted tenants which stipulate that any reduction in statutory charges (e.g. land tax, council rates) or insurance should be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.

The Declaration will operate in conjunction with other measures introduced by the ACT Government in an effort to limit the impacts of COVID-19 on commercial tenancies including general rates relief available through the ACT Government's 'Economic Survival Tranche 2' stimulus package which provides for a tiered category system of rates relief for some commercial landlords that provide rent reductions to impacted tenants.

See: section 4 of the Declaration

Security

25. Can a landlord draw on a tenant's security for non-payment of rent?

Landlords are prohibited from taking certain prescribed action, including recovering the whole or part of a security bond under the lease. Nonetheless, this is subject to the exemptions outlined above. For example, a landlord may draw on a tenant's security for the non-payment of rent in the following circumstances:

- where the landlord and tenant have engaged in good faith negotiations and the tenant agreed to the landlord drawing on its security; and
- where they are drawing on the security for a breach that is not a prescribed breach under the Declaration.

See: sections 8(1) and 8(2)(h) of the Declaration

Lease extension

26. Do landlords need to offer a lease extension to tenants?

The Declaration does not require that landlords offer a lease extension to impacted tenants. Nonetheless, as stated above, the Declaration requires parties to 'have regard' to the leasing principles set out under the National Code when negotiating in good faith with impacted tenants which stipulates that tenants should be able to extend their lease for the equivalent period of any waiver or deferral.

See: Leasing principle 12 of the National Code and sections 6 and 8 of the Declaration

Rent increase freeze

27. Can landlords increase the rent during the COVID-19 pandemic period?

There is no provision in the Declaration that prevents landlords from increasing rent during the COVID-19 pandemic. However, if required under the Declaration to negotiate in good faith, Landlords will be required to have regard to the principles of the National Code.

Leasing principle 13 under the National Code reads: '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'.

See section 4 of the Declaration and Leasing principle 13 of the National Code

Unpaid rent deferrals

28. Can landlords claim unpaid rent deferrals at the end of a lease?

Yes. As stated above, when negotiating in good faith, parties are only required to 'have regard' to leasing principle 5 of the National Code, which requires that the payment of rental deferrals must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is greater, unless otherwise agreed by the parties.

See: section 4 of the Declaration and Leasing principle 5 of the National Code

Reduced trade

29. Can tenants be penalised for reduced opening hours or cessation of trade?

A failure by an impacted tenant to operate the business on the premises under the lease during the hours required under the lease during the prescribed period is classified as a prescribed breach. As such, a landlord is required under the Declaration to engage in good faith negotiations with the tenant prior to taking action under the lease or starting a proceeding for any of the following:

- termination of the lease;
- eviction of the tenant from premises or land under the lease;
- exercise of a right of re-entry to the premises or land;
- recovery of the premises or land;
- distraint of goods on the premises or land;
- forfeiture;
- damages;
- requiring payment of penalty interest on, or a fee or charge related to, unpaid rent otherwise payable by the tenant;
- recovery of the whole or part of a security bond under the lease;
- performance of obligations by the tenant or any other person guaranteeing the tenant's obligations under the lease;
- possession of the premises or land; or
- any other remedy otherwise available against the tenant under a territory law.

See: section 6 of the Declaration

Dispute resolution and mediation

30. If a leasing dispute arises, do parties have to attend a mediation?

If a leasing dispute arises between a landlord and an impacted tenant and that dispute is in relation to a prescribed breach, the parties will be required to engage in good faith negotiations under the Declaration, but will not automatically be required to attend mediation.

A COVID-19 Local Business Commissioner has been appointed by the ACT Government as a Commercial Tenancy Mediator to mediate in lease negotiations between landlord and tenants affected by the economic impact of COVID-19.

Although the mediation service offered by the Commissioner is both voluntary and free for the parties, the Magistrate's Court will not permit proceedings to enforce a termination or prescribed action in response to a prescribed breach to commence unless a mediation has first taken place. The Guidance Notes also emphasise that the mediation service offered by the Commissioner does not replace or affect in any way mediation under the Leases Act and that landlords and tenants are able to instead a private mediator.

See: note at section 4 of the Declaration and the Guidance Notes

31. What are the consequences if the landlord or tenant breaches the obligation to negotiate rent relief under the Declaration?

As above, there is no obligation under the Declaration that a landlord and tenant negotiate rent relief. However, if a landlord does not engage in good faith negotiations (which require that the parties take in account the overarching and leasing principles of the National Code, which recommend rent relief where required), any notice of termination or any other prescribed action will be deemed void.

See: sections 6 and 8 of the Declaration

32. What happens if the mediation process fails?

The Magistrate's Court will not permit proceedings to enforce a termination or prescribed action in response to a prescribed breach to commence unless a mediation has first taken place. As such, if a landlord and tenant are unable to reach a resolution through mediation, the Magistrates Court will need to determine whether the landlord has participated in good faith in accordance with the National Code principles before making a termination order.

As noted above, the Declaration states that the Magistrates Court must also not confirm the termination of a lease where a termination notice has been issued to an impacted tenant in the pre-commencement period in relation to a prescribed breach unless satisfied that the landlord has engaged in good faith negotiations with the impacted tenant.

See: clause 7 of the Declaration and the Guidance Notes

Other obligations

33. Does the Declaration impose any other obligations on landlords and tenants?

Unlike some other jurisdictions, in the ACT there are no additional obligations imposed on a landlord and tenant over and above what is described here and in our National Compendium.

Lenders/mortgagees

34. Are there any specific rights or obligations for lenders/mortgagees under the Declaration?

No, the regulation does not set out specific rights or obligations for lenders/mortgagees.

Ineligible tenants

35. What are the expectations on landlords if the tenant falls outside the Declaration?

Unlike the National Code, there is no reference to "in spirit" application to ineligible lessees.

