# Queensland Commercial tenancies code of conduct explained

21 August 2020

## Frequently asked questions about the commercial tenancies code of conduct in Queensland

### 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 QLD law?

On 23 April 2020, the QLD Parliament passed the *COVID-19 Emergency Response Act 2020* (Qld) (**Act**). The Act paved the way for the National Code to be implemented into QLD law by allowing regulations to be made under the Act or the *Retail Shop Leases Act 1994* (Qld) providing for the following:

1. prohibiting the recovery of possession of premises under a relevant lease by a landlord of the premises from a tenant of the premises;
2. prohibiting the termination of a relevant lease by a landlord or owner of premises;
3. regulating or preventing the exercise or enforcement of another right of a landlord of premises under a relevant lease or other agreement relating to the premises;
4. exempting a tenant, or a class of tenants, from the operation of a provision of an Act, relevant lease or other agreement relating to the leasing of premises;
5. requiring parties to a relevant lease to have regard to particular matters or principles, or a prescribed standard, code or other document, in negotiating or disputing a matter under or in relation to the relevant lease; and
6. providing for a dispute resolution process for disputes relating to relevant leases.

The Act also established a temporary Small Business Commissioner to undertake advocacy for small businesses and to administer a mediation process for affected lease disputes and small business tenancy disputes.

On 28 May 2020, the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (Qld) (**Regulations**) were published by the Queensland Government. The Regulations apply for the period from 29 March 2020 to 30 September 2020 ('response period'). As stated at the outset of the Regulations, one of its main purposes is to mitigate the effects of the COVID-19 emergency on landlords and tenants under affected leases by giving effect to the good faith leasing principles set out in the National Code.

The Regulations seek to achieve this by imposing certain obligations and prohibiting certain actions by a landlord under an 'affected lease' during the 'response period'.

### 2. What are the key issues dealt with in the QLD Regulations?

The Regulations set out the following key measures:

- tenant's eligibility for rent relief;
- prohibited actions, which include that landlords must not, within the 'response period':
  - increase rent;
  - terminate leases for non-payment of rent;
  - seize the tenant's property, including for the purpose of securing payment of rent;
  - exercise or enforce any other right by the landlord under the lease or other agreement relating to the premises.
- a process for rent relief negotiations;
- obligation to negotiate reasonably and in good faith;
- mediation and dispute resolution mechanism; and
- confidentiality obligations.

## Pandemic period

### 3. When will the Regulations operate?

The Regulations are in effect until 31 December 2020, and will have effect during the 'response period' which is the period from 29 March 2020 to 30 September 2020.

## Eligibility crtieria

### 4. What types of leases are eligible?

Under the Regulations, an eligible lease (called an 'affected lease') includes:

- retail shop leases under the *Retail Shop Leases Act 1994* (Qld); or
- leases other than a retail shop lease, under which the premises are to be wholly or predominantly used for carrying on a business (a 'prescribed lease').

Under the Regulations, an eligible lease does not include:

- leases under which premises are to be used wholly or predominantly for a farming business under the *Farm Business Debt Mediation Act 2017;* or
- a lease, permit, licence or sublease under the *Land Act 1994*, unless it is a sublease of premises under a lease that has a rental category of 13 or 16 under that Act, or the sublessor under the sublease is not a government leasing entity within the meaning of the *Land Regulation 2009*.

See: *r 5 of the Regulations and s 23(8) of the Act*

### 5. Who is an eligible tenant?

An eligible tenant is a tenant who:

- is an SME entity, that is, the tenant's annual turnover was (in the previous year) or is likely to be (in the current year) less than $50 million; and
- the tenant, or an entity that is connected with, or an affiliate of, the tenant responsible for employing staff for the business carried on at the premises, is eligible for the JobKeeper scheme.

### 6. Do the Regulations apply to licensees who are in reality tenants?

Yes, provided the licensee otherwise meets the requirements above relating to eligible tenants and eligible leases.

This is because the definition of 'lease' includes a lease, sub-lease, licence or other agreement under which a person grants a right to another person to occupy premises (other than as a residence).

*See: s 23(8) of the Act and Sch 1 Dictionary (definition of 'lease') of the Regulations*

## Definition of turnover and provision of information

### 7. How is turnover defined?

Turnover is the annual turnover of the business carried on by the tenant at the premises, except:

- if the tenant is an entity connected with, or an affiliate of, another entity, turnover is calculated as the aggregate annual turnover of the entities; and
- if the tenant is a franchisee, turnover is based on the business carried on at the premises.

Turnover of a business includes income earned from internet sales, but does not include a grant or assistance given by the Commonwealth, State or a local government to mitigate the effects of the COVID-19 emergency.

See: *r 5 of the Regulations*

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

The Regulations do not set out specific documentation requirements. Under the Regulations, the parties are required to, as soon as practicable, give each other information which is true, accurate, correct and not misleading, and sufficient to enable the parties to negotiate in a fair and transparent way. The Regulations provide examples of what constitutes 'sufficient information'. This includes:

- a clear statement about the terms of the lease the initiator is seeking to negotiate;
- a statement by the tenant that demonstrates why the lease is an affected lease, accompanied by supporting information and evidence, including:
  - accurate financial information or statements about the turnover of the tenant's business;
  - information demonstrating that the tenant is an SME entity, having regard to any entities that the tenant is connected with, or an affiliate of;
  - evidence of the tenant's eligibility for, or participation in, the jobkeeper scheme;
  - information about any steps the tenant has taken to mitigate the effects of the COVID-19 emergency on the tenant's business, including the details of any assistance being received by the tenant from the Commonwealth, State or a local government; and
- in relation to a franchisor, information about any concession or benefit provided to or by the franchisor in relation to rent or outgoings for the premises occupied by the franchisee, and any undertakings to pass those concessions or benefits on to the franchisee.

See: *r 14 of the Regulations*

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## Confidentiality requirements

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

- A party to an eligible lease dispute must not disclose protected information obtained under or as a result of the operation of the Regulations, other than:
  - with the consent of the person to whom the information relates; or
  - to a professional advisor or financier who agrees to keep the information confidential; or
  - to the extent the information is available to the public; or
  - as authorised by the small business commissioner; or
  - as authorised under an Act or law.

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- Protected information means personal information or information relating to business processes or financial information, including information about the trade of a business.

See: *r 20 of the Regulations*

## Application of Leasing Principles

### *Good faith obligations*

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

Parties are under a general obligation to negotiate in good faith the rent payable under, and other terms of, the commercial lease, as well as in all discussions and actions associated with a dispute.

This general obligation 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 s 18 of the Australian Consumer Law);
- not provide false information in the course of the negotiations;
- not frustrate the negotiation process (such as by refusing to meet, or refusing to provide documents); or
- threatening a future breach of contract.

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

See: *r 11, r 15(3) and r 25(2) of the Regulations*

### *Rent relief process*

### 11. What is the process for initiating rent relief?

The Regulations set out the framework for landlords and eligible tenants to negotiate rent relief as follows:

- any 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;
- after the request is made, the parties must, as soon as practicable, give each other information relating to the request that is true and accurate and sufficient to enable the parties to negotiate in a fair and transparent way;
- within 30 days after a party receives sufficient information about a request, the landlord must offer the tenant a reduction in the amount of rent payable under the lease, and any proposed changes to other stated conditions;
- on receiving the landlord's offer, the tenant and landlord must cooperate and act reasonably and in good faith in negotiating a reduction in the amount of rent payable under the lease for the response period, including any conditions relating to the reduction in rent.

See: *r 14 and r 15 of the Regulations*

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

When making an offer of rent relief, landlords must have regard to:

- all the circumstances of the tenant and the affected lease, including the reduction in turnover of the business carried on at the premises during the response period;
- the extent to which a failure to reduce the rent payable under the lease would compromise the tenant's ability to comply with the tenant's obligations under the lease, including the payment of rent;

- the landlord's financial position, including any financial relief provided to the landlord as a COVID-19 response measure; and
- if a portion of rent or another amount payable under the lease represents an amount for land tax, local government rates, statutory charges, insurance premiums or other outgoings—any reduction in, or waiver of, the amount payable.

See: *r 15(2) of the Regulations*

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

The Regulations do not dictate the type of rent relief that a landlord must offer. However, unless otherwise mutually agreed between the parties (in accordance with r 10(1)):

- the landlord must offer to the tenant a reduction in the amount of rent payable under the lease;
- at least 50% of the rent reduction offered must be in the form of a waiver of rent;
- where the parties agree to a deferral of rent, the deferral must comply with certain requirements under the Regulations including that the landlord:
  - cannot require the tenant to pay interest or other fees in relation to the deferred amount (except where that amount is not paid on time in accordance with the deferral arrangements); and
  - may continue to hold (and claim on) any lease security deposit until the deferred rent (if any) is paid in full;

See: *r10(1), r 15(2) and r 17 of the Regulations*

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

Unless otherwise mutually agreed between the parties (in accordance with r 10(1)), at least 50% of the rent reduction offered must be in the form of a waiver of rent.

See: *r 10(1) and r 15(2)(b) of the Regulations*

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

The landlord must *have regard to* the all the circumstances of the tenant and the affected lease, including the reduction in turnover of the business carried on at the premises during the response period. There is however, no requirement that the rent reduction must be proportionate to the tenant's reduction in trade.

See: *r 15(2)(c)(i) of the Regulations*

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

Payment of the deferred rent must amortised, using a method agreed between the parties, over a period of at least 2 years but no more than 3 years (unless otherwise mutually agreed between the parties in accordance with r 10(1)).

See: *r 10(1) and r 17(2)(b) of the Regulations*

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

The landlord must not require the tenant to pay interest or any other fee or charge in relation to an amount of deferred rent, unless the tenant fails to comply with the conditions on which the rent is deferred.

See: *r 17(2)(c) of the Regulations*

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### *Pre-agreed rent relief and subsequent rent relief*

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

Yes. If, after a reduction in the amount of rent is agreed between the parties to an affected lease (whether the agreement is entered into before or after the commencement), a ground on which the agreement is based changes in a material way, either party may ask the other to negotiate a further reduction in rent during the response period.

A material change will occur for example, where:

- the tenant's turnover has not increased as significantly as anticipated; or
- the tenant's income decreases substantially.

This process applies as if the party making the request were the initiator of the request. However, the landlord's offer need not include a waiver of rent for at least 50% of the reduction offered.

See: *r 16 of the Regulations*

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

If parties have already agreed to rent relief, the validity of that agreement will not be affected by the Regulations. However a party to a previously agreed agreement may still seek to negotiate a condition of the lease (provided it is an affected lease) in accordance with the Regulations.

See: *r 10 of the Regulations*

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### *Prohibited enforcement actions*

## 20. What actions are landlords prohibited from taking?

Unless otherwise mutually agreed between the parties (in accordance with r 10(1)), Landlords are prohibited from taking 'prescribed action' on any of the following grounds:

- a failure to pay rent or outgoings for a period occurring wholly or partly during the response period; or
- the business carried on at the premises not being open for business during the hours required under the lease during the response period.

A 'prescribed action' means taking action under a lease or another agreement relating to premises, or starting a proceeding in a court or tribunal, for any of the following in relation to the lease or other agreement:

- recovery of possession;
- termination of the lease;
- eviction of the tenant;
- exercising a right of re-entry to premises;
- seizure of any property, including for the purpose of securing payment of rent;
- forfeiture;
- damages;
- the payment of interest on, or a fee or charge relating to, unpaid rent or outgoings;
- a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings;
- the performance of an obligation by the tenant or another person under a guarantee under the lease;
- exercising or enforcing another right by the landlord under the lease or other agreement relating to the premises.

See: *r 9 and r 10(1) of the Regulations*

## 21. When may a landlord take enforcement action against a tenant?

- The Regulations do not prevent the landlord and tenant under the lease agreeing to a prescribed action being taken by the landlord, or agreeing to terminate the lease. However, even if the parties agree to an enforcement action, a party is not prevented from seeking to negotiate a condition of an affected lease because of that agreement.
- The Landlord is also not prevented from taking a prescribed action:
  - in accordance with a variation of the lease made under the Regulations;
  - in accordance with a settlement agreement or other agreement between the landlord and the tenant;
  - in accordance with an order of a court or tribunal;
  - if, despite a genuine attempt by the landlord to negotiate rent payable and other conditions of the lease, the tenant has substantially failed to comply with the tenant's obligations under the Regulations in relation to the negotiations; or
  - on a ground that is not related to the effects of the COVID-19 emergency.

See: *r 10 and r 12(2) of the Regulations*

### *Arrears*

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

- Landlords cannot take a 'prescribed action' against tenants who are in arrears or otherwise in default from 28 May 2020 until 30 September 2020.

- Any proceeding or action against the tenant for a 'prescribed action' which was started on or after 29 March 2020 but are unresolved, incomplete or not finalised by 28 May 2020 are now taken to be stayed or suspended until 30 September 2020.
- However, as noted above, nothing in the Regulations prevent a landlord from taking prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic. As an example, the landlord may terminate a lease if the tenant has breached the lease by damaging the premises or fails to vacate the premises at end of the term.
- The Regulations also provide a general exemption for any act or omission (occurring on or after 28 May 2020) of a tenant under an affected lease, if the act or omission is required under a COVID-19 response measure or a law of the Commonwealth or another State in response to the COVID-19 emergency.

See: *r 48 of the Regulations*

### *Outgoings*

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

The landlord is simply required to *have regard to* a reduction in (or waiver of) outgoings, where an amount payable under the lease represents an amount of outgoings (land tax, local government rates, statutory charges, insurance premiums or other outgoings). There is no strict requirement on the landlord to pass on any reduction in outgoings to the tenant.

See: *r 15(2)(c) of the Regulations*

### *Security*

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

- A 'prescribed action' includes a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings. As noted above, a landlord cannot take a prescribed action for a failure to pay rent or outgoings for a period occurring wholly or partly during the six-month response period.
- However, despite the terms of the lease, if there is a deferral of rent the landlord may hold any security deposit until the deferred rent has been paid.

See: *r 9 and r 17(3) of the Regulations*

### *Lease extension*

## 25. Do landlords need to offer a lease extension to tenants?

Yes. If rent under an affected lease is waived or deferred for a period, the landlord must offer the tenant an extension to the term of the lease on the same conditions as those contained in the lease except that the rent payable during the extension must be adjusted for the waiver or deferral.

However, the obligation for the landlord to offer to extend the lease:

- applies only to the extent the landlord is not subject to an existing legal obligation that is inconsistent with the obligation to extend the lease; and
- does not apply if the landlord demonstrates that the lease cannot be extended because the landlord intends to use the premises for a commercial purpose of the landlord.

See: *r 18 of the Regulations*

### *Rent increase freeze*

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

The Regulations prohibit rent increases for impacted tenants during the response period. This effectively suspends all fixed, consumer price index, market review and other rent increases from coming into effect during the response period, but does provide an exception when rent or a component of rent is determined by reference to the tenant's turnover.

See: *r 13 of the Regulations*

### *Unpaid rent deferrals*

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

No. Unless otherwise mutually agreed between the parties (in accordance with r 10(1)), the landlord cannot require the repayment of any deferred rent until the day after the end of the response period. Any repayments must be amortised, using a method agreed between the parties, over a period of at least 2 years but no more than 3 years.

See: *r10(1) and r 17 of the Regulations*

### *Reduced trade*

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

No. A landlord cannot take a 'prescribed action' for the business carried on at the premises not being open for business during the hours required under the lease during the response period. Note: see above for meaning of 'prescribed action'.

See: *r 12(1)(c) of the Regulations*

## Dispute resolution and mediation

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

Yes. If the Small Business Commissioner refers an eligible lease dispute to mediation, the parties must attend the mediation conference. If a party fails to attend, a court or tribunal may award costs against the party in a proceeding relating to the lease dispute.

However, the Regulations do not prevent parties to an eligible lease dispute agreeing to an alternative form of dispute resolution.

The Regulations provide a dispute resolution process for 'eligible lease disputes' which are:

- any dispute concerning the liabilities or obligations of the parties to an affected lease arising during the response period, and includes a dispute about negotiating, or a failure to negotiate, rent under the Regulations (an 'affected lease dispute'); or
- a dispute about a small business lease, or about the use or occupation of the premises (a 'small business tenancy dispute').

The dispute resolution process provided by the Regulations involve the following:

- parties are required to cooperate and act reasonably and in good faith in all discussions and actions associated with an eligible lease dispute;
- parties are required to attempt to resolve the eligible lease dispute before referring it to the Small Business Commissioner;
- a party to an eligible lease dispute may give notice of the dispute to the Small Business Commissioner. The dispute notice must be in the form approved by the Small Business Commissioner; and
- the Small Business Commissioner may only dismiss the notice if it considers the dispute notice does not relate to an eligible lease, is frivolous or vexations or has not been given in good faith. Otherwise, the Small Business Commissioner must refer an eligible lease dispute to mediation (the procedure for which is provided for in the Regulations).

See: *Part 3 of the Regulations*

### 30. What are the consequences if the landlord or tenant breaches the obligation to negotiate rent relief under the Regulations?

As set out above, if a party breaches their obligations under to negotiate rent relief under the Regulations, a party can seek mediation in the first instance. Where the landlord and tenant are unable to reach an agreement through this process, the parties can pursue action through the Qld Civil and Administrative Tribunal or the civil courts.

There are no civil penalties for non-compliance.

See: *Part 3 of the Regulations*

### 31. What happens if the mediation process fails?

If the mediation fails to resolve the dispute, a party can apply to QCAT. The party must give the small business commissioner written notice that the party has made the application.

See: *r 41 of the Regulations*

## Other obligations

### 32. Do the Regulations impose any other obligations on landlords and tenants?

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

## Lenders/mortgees

### 33. Are there any specific rights or obligations for lenders/mortgagees under the Regulations?

No, the Regulations do not set out specific rights or obligations for lenders/mortgagees.

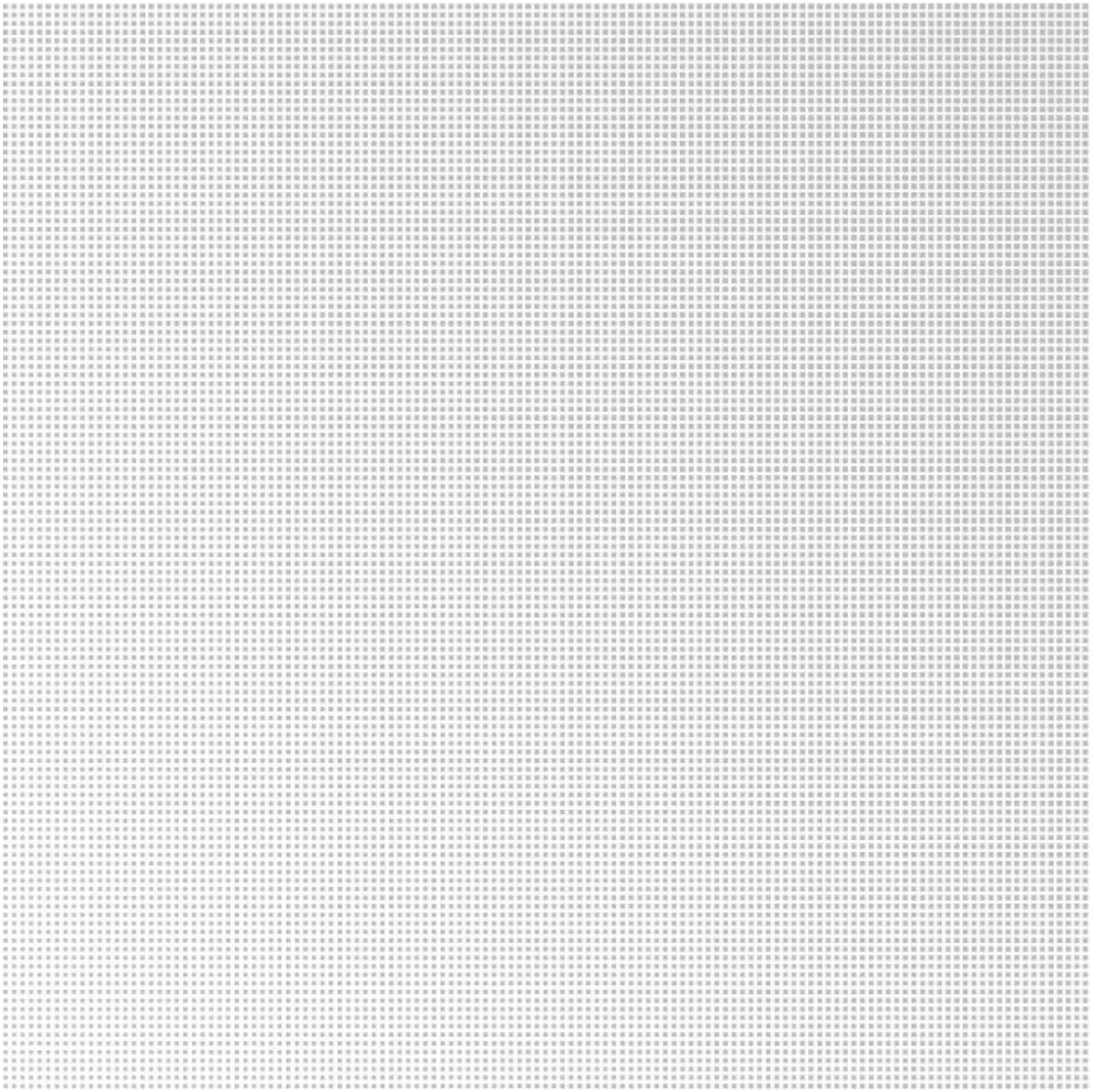
## Ineligible tenants

### 34. What are the expectations on landlords if the tenant falls outside the Regulations?

The intention of the National Cabinet to apply the National Code 'in spirit to all leasing arrangements for affected businesses' is neither reflected nor reinstated in the Regulations.

The objectives of the Regulations are in terms of 'eligible leases' only, which suggests that the Regulations should not have application to any commercial leases which fall outside of the definition of 'eligible lease'.

Therefore, for non-eligible leases, any rent relief arrangements become a matter of commercial negotiation between a landlord and a tenant.



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