

COVID-19: 'MANDATORY CODE OF CONDUCT - COMMERCIAL TENANCIES'

COVID-19: 'Mandatory Code of Conduct – Commercial Tenancies' ("National Code") and moratorium on evictions- implementation by state and territory governments and what it means for landlords and tenants in medical and healthcare practices

What is the National Code and does it apply to medical and healthcare practices?

The effects of the COVID-19 pandemic ("COVID-19") are being felt across all sectors and commercial tenancies are no exception to that.

On 7 April 2020, the Prime Minister announced that the National Cabinet agreed that states and territories would implement the National Code, in order to implement a common set of agreed principles in relation to commercial tenancies, including retail, office and industrial tenancies.

The National Cabinet proposed that affected parties come together to discuss ways of business survival and the application of good faith leasing principles to underpin state and territory legislation to govern interventions aimed at aiding commercial tenancies during the period of COVID-19.

Medical and healthcare practices across Australia potentially fall within the scope of the application of the National Code in their capacity as either a landlord or tenant. Further, a medical practice that is a tenant may sublease part of its premises to allied healthcare practices, such as a dentist or the provider of pathology services and in that case will be in the position of a landlord under the National Code.

While at the time of writing, legislation has not yet been passed in each state

and territory to implement the rights and obligations under the Code and there is no current mechanism for enforceability, it is expected that mechanisms for the enforceability of the National Code will be included in legislation in some form.

Medical and healthcare practices need to be aware of the obligations of a landlord and a tenant under the National Code if negotiating rental relief for the period of COVID-19 and a recovery period.

Key objectives of the National Code are: to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period; and balance the interests of tenants and landlords.

It is important to be aware that the National Code encourages negotiation in good faith generally between landlords and tenants, irrespective of the application of the National Code and any legislation or regulations made in response across the Australian states and territories. Good faith negotiation is a critical feature of the National Code and expected state and territory legislation.

The overarching principle of the National Code is the proportionality principle outlined in the National Code, where landlords will need to offer tenants rent relief proportionate to the tenant's decline in turnover.

Under the principles of the National Code, half of this rent relief should be given in the form of a rent waiver, while the other half can be deferral of rent spread over the life of the lease and not less than 24 months.

The National Code is clear that once parties agree on the application of the National Code to the tenant and its business then any failure to agree

temporary measures will result in a binding decision being made for the parties.

The National Code provides for the referral of matters that cannot be negotiated to mediation under the applicable state or territory retail/commercial leasing dispute resolution processes for binding mediation, such as small business commissioners. Prior to publication of the National Code, the National Cabinet announced a temporary moratorium on evictions of both commercial and residential tenants in financial distress who are unable to meet their commitments during the COVID-19 crisis.

The landlord or tenant of a medical or healthcare practice will need to review the specific terms of the legislative regime that applies to each individual lease.

Application of the Code to a tenant suffering financial stress or hardship

The National Code applies to owners, operators, other landlords and tenants. It applies to small to medium enterprise (SME) commercial tenancies where the tenant is suffering financial stress or hardship as a result of COVID-19. Under the National Code, the tenant's circumstances must meet the threshold twofold test as follows – the tenant must be:

- an eligible business for the purposes of the Commonwealth Government's JobKeeper program; and
- an SME with annual turnover of up to and no more than \$50 million.

Overarching and leasing principles

The National Code provides that landlords and tenants will each:

Negotiate in good faith; and

Act in an open, honest and transparent manner, and will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with the National Code.

The National Code contains 14 leasing principles including obligations of a landlord and the mitigating measures the landlord should take and pass on to the tenant, as well as any circumstances of the landlord that may impact negotiations and proportionate outcomes.

A copy of the National Code, including the 14 leasing principles is available at: <https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-of-conduct-sme-commercial-leasing-principles.pdf>.

State and territory legislation implementing the National Code

The National Code will be implemented by each Australian state and territory by legislation and regulation as appropriate. The National Code is intended to complement such legislation and not supersede it during the period of COVID-19. The Code comes into effect in all states and territories "from a date following 3 April 2020" to be defined by each state and territory for the period that the Commonwealth JobKeeper Program remains operational.

The legislation ultimately passed in each state and territory will not be identical.

While at the time of writing it is expected to be similar, each implementing the rights, obligations and principles set out in the National Code, any given jurisdiction may legislate quite differently and may divert from obligations or criteria proposed under the National Code.

At the time of writing, the Victorian government has announced it will legislate consistently with the National Code, including for example eligibility criteria and measures regarding the waiver and deferral of rent.

By way of example, in Western Australian legislation which was passed on 17 April 2020 does not apply the same eligibility criteria in the National Code and Western Australia will be introducing its own State Code by way of regulation.

The timing of introduction, assent and any application of legislation or regulations retrospectively will be different in each state and territory. The National Code, whilst itself not law, will remain complementary to each state and territory based legislation implementing the good faith leasing principles.

Key takeaways

As a first step, tenants and landlords should undertake frank discussions about both their respective financial positions if at any stage during the period of COVID-19 it is clear a tenant becomes financially distressed as a result.

Many landlords and tenants will have been negotiating early during the onset of COVID-19. The parties need to consider the tenant's eligibility under the National Code (and the terms of the legislative regime in each state and territory as it applies the National Code) as well as the reduction in revenue, and the losses and overheads that the landlord needs to cover to ensure its own continuity of business in the spirit of the objectives of the National Code.

Depending on the specific relevant legislation, the parties should document any agreements in writing, preferably by way of a deed of variation

of the lease. Each arrangement will need to be tailored to the circumstances.

Please contact Annabel Viner, Special Counsel, Meghan Warren, Principal or Kristy Muhlhan Principal with any queries on the COVID-19 relief schemes for commercial tenancies via email aviner@burkelawyers.com.au, mwarren@burkelawyers.com.au or kmuhlhan@burkelawyers.com.au or phone 039822 8588 <https://burkelawyers.com.au>

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