

The National Cabinet Rent Code

SME commercial leasing principles during COVID-19

Up to date as at 8 April 2020

The purpose of the Code of Conduct released by National Cabinet is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government's [JobKeeper](#) program.

These principles will apply to negotiating amendments in good faith to existing leasing arrangements – to aid the management of cashflow for SME tenants and landlords on a proportionate basis – as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared COVID-19 pandemic.

This Code applies to all tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government's JobKeeper programme (30% fall in turnover), with an annual turnover of up to \$50 million (herein referred to as "SME tenants").

The Code will be given effect through relevant state and territory legislation or regulation as appropriate.

This Code will have implications for SMSFs with commercial tenancies. This Code does not apply to SMSFs with residential tenancies.

What are the key takeaways?

The objective of the Code is to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords.

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
2. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant's trade during the COVID-19 pandemic period and a subsequent reasonable recovery period.
3. Rental waivers must constitute no less than 50% of the total reduction in rent payable over the COVID-19 pandemic period and should constitute a greater proportion of the total reduction in rent payable in cases where failure to do so would compromise the tenant's capacity to fulfil their ongoing obligations under the lease agreement. Regard must also be had to the landlord's financial ability to provide such additional waivers. Tenants may waive the requirement for a 50% minimum waiver by agreement.
 - *Example: Up to half could be through a deferral of rent, with this to be recouped over a period of at least 24 months in a manner that is negotiated by the parties.*

- *So, if the tenant's revenue has fallen by 100%, then at least 50% of total cash flow relief is rent free/rent waiver and the remainder is a rent deferral. If the qualifying tenant's revenue has fallen by 30%, then at least 15% of total cash flow relief is rent free/rent waiver and the remainder is rent deferral.*
 - *Care should be taken to ensure that any repayment of the deferred rent does not compromise the ability of the affected SME tenant to recover from the crisis.*
4. Payment of rental deferrals by the tenant must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties.
 - a. Example: Where a tenant only has 3 months remaining on their lease arrangement, they may be entitled to up to 24 months to repay any of the deferred rent.
 5. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period.

[Click here to read more in the full Code.](#)

This provides a clear framework for SMSFs which are providing rent relief for their commercial tenants. The same framework should apply if the tenant is a related party eligible for the JobKeeper program.

The ATO will not be taking action where an SMSF gives a tenant – who is also a related party – a temporary rent reduction or waiver during this period. However, this Code should be referenced when negotiating with a related party any reduction in rent to ensure it is reasonable and measurable against the impact of COVID-19 on the tenant. SMSF trustees can expect any rent relief offered to be audited by the SMSF's auditor in the context of this Code.

Where the commercial property owned by the SMSF is subject to a compliant LRBA, any loan relief afforded to the landlord may be insufficient to offset the rent relief required under this Code. SMSF trustees will need to consider alternative sources from which to continue to fund all expenses associated with the commercial property, including loan repayments, land tax, council rates etc.

The Association will provide further context on the application of the Code for SMSFs when more information is released.

For SMSFs with residential tenancies, we await further guidance from each of the States and Territories. Given the potential for SMSFs to be impacted differently depending on where their residential property is situated, this will add a new layer of complexity to ensuring the appropriate relief is put in place, especially when dealing with a related party tenant.

Remain up to date with the SMSF Association's COVID-19 response webpages which are regularly updated as more information and resources come to light.

For SMSF professionals, visit:

<https://www.smsfassociation.com/the-smsf-associations-covid-19-response/>

For SMSF trustees, visit:

<https://smsfconnect.com/news/the-smsf-associations-covid-19-response>