

## COVID-19: Commercial Tenancies and the Code of Conduct

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One of the biggest concerns for many businesses navigating the Coronavirus Crisis is the issue of meeting ongoing lease obligations for premises. The Federal Government recognised this early by releasing a 'mandatory' Code of Conduct for landlords and tenants. The full implementation of all the measures included in the Code is still being considered by the South Australian State Government, but in the meantime, a number of its 'good faith' principles have been given legislative authority in South Australia through the COVID-19 Emergency Response Act 2020.



Even in a thriving economy, rent can be one of the more onerous financial commitments for business owners. But at time like this, when there may be a significant decline in income, how does a business pay rent when there's a lot less money coming in the door? This can quickly trigger the demise of a cash-strapped business.

The Federal Government Code of Conduct seeks to alleviate this concern. The problem with a 'National' Code of Conduct however is that it has no real authority, because lease agreements and tenancies are the domain of the States. This is why State-based legislative amendments are required to enforce the principles of the Federal Code.

The distinction between the Federal Code and the State-based legislation is important because as of the time of writing, the full provisions of the Code have not been legislated in South Australia. In effect, the COVID-19 Emergency Response Act 2020 mirrors some of the protection principles of the Code, while the relief guidelines have yet to be implemented.

The essential elements of the SA State-based legislation, as it currently stands, are as follows:

1. **A lessor cannot take any action against a lessee experiencing 'financial hardship' as a consequence of COVID19 restrictions** - This is the centrepiece of the Code. 'Prescribed' actions basically covers all those things a landlord might do in the event of non-payment of rent and/or outgoings, such as evicting the tenant, exercising right of re-entry, charging interest on outstanding amounts and drawing upon a security bond. 'Financial hardship' is taken as a given if the business of the tenant is eligible for JobKeeper.
2. **Any act or omission by a tenant triggered by the COVID19 crisis will not amount to a breach of a lease** - These two measures together are intended to force the parties to the negotiating table.

**3. Unless mutually agreed, rent cannot be increased if the lessee is suffering 'financial hardship' as a result of the pandemic.**

**4. A lessor cannot require a lessee to pay land tax (or a reimbursement thereof) where the lessee is suffering the same 'financial hardship'.**

The National Code of Conduct explicitly states that its good faith principles are to be applied to tenancies with an annual turnover of up to \$50 million. There is, however, no mention of this turnover restriction in the State-based legislation. This would seem to suggest that in South Australia at least, no commercial tenant - of any size - that is experiencing financial stress as a result of the pandemic can be evicted for defaulting on their rent.

Further, the Code of Conduct only applies to commercial tenancies, however the legislation in South Australia extends the same protection (listed above) to residential tenancies experiencing financial hardship as well.

At this point, the legislation simply protects tenants from being evicted if they are unable to pay rent as a result of the crisis. It doesn't explicitly require landlords to offer any rent reduction.

This means that what happens next is about negotiation. The legislation does provide for mediation to be sought from the [Small Business Commissioner](#), at the request of the landlord or the tenant, but in the end, it is the Code that goes that next step to cover the matter of rent relief for commercial tenancies. Without State legislation though, the Code remains little more than a set of good faith principles, recommendations and best practices.

The Code of Conduct makes the following recommendations:

- 1. Landlords must offer tenants a reduction in rent that is proportional to the reduction in the tenant's level of trade** - This can be up to 100% of the amount ordinarily payable.
- 2. No less than 50% of that amount must be in the form of waivers** - Whatever the level of reduction, at least half of any reduction must be a complete waiver, with no expectation of future repayment. For example, if the amount of rent is reduced by \$2,000 per month for the period of the crisis, at least \$1,000 of that is to be foregone. This is the minimum. The Code also recommends that waivers should be a higher proportion of any rent reduction where not doing so would compromise the ability of the tenant to fulfil the future terms of the lease.
- 3. The balance of any reduction should be in the form of a deferral** - Deferred rent should be amortised over the balance of the term of the lease, or no less than 24 months (whichever is greater).

There are additional recommendations relating to a range of scenarios, including the recovery of expenses and the proportionate sharing of any benefit extended to the landlord by their financial institution. Please refer to the full [Code of Conduct](#) for more information.

This summary is provided as general information only. A detailed consideration of the provisions of both the legislation and the Code of Conduct is really more in the wheelhouse of the lawyers, and we'd recommend seeking legal advice before acting on anything specific to the terms of your own lease.

At the end of the day, the Code of Conduct is effectively a protection mechanism for tenants. While it's framed in the language of good faith principles for the benefit of landlords and occupants, the primary benefit for the property owner is limited mostly to that of retaining a good tenant when the crisis is over. As we've noted previously, relief for tenants is welcome, but not every landlord is a large corporate property developer. Some are Mum and Dad investors, others are Self-Managed Super Funds. Many own only a single property as a primary source of income. There is an implicit assumption in the provisions of the Code that the landlord is cashed-up and holding all the cards, and needs to have an arm-twisted to extend some grace. This may well be the case in some instances, but every situation is different and there is no question many landlords will be doing it tough if their source of rental income

dries up.

Please [contact us](#) for further information or assistance.

**We're here to help and are continuing to offer complimentary phone calls to support you and your business with these measures during this time.**

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