

# Tabled report

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## Commercial rental properties – (COVID-19) Mandatory Code

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**Business activity priority**

Strategy and Planning

**Goal 2**

Align strategic direction to core functions and sustainability

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### Recommendation

That Council:

1. Receive and note this report.
2. Resolves, that in response to the COVID-19 pandemic, that any requests for financial relief by commercial tenants of Council-owned and managed properties be managed in accordance with the (yet to be enacted) NSW Government scheme, which gives effect to the National Cabinet Mandatory Code of Conduct:
  - a. For the financial period up until 30 June 2020, via report to Council for determination, with 28 days public notice; and
  - b. For the financial period from 1 July 2020, via report to Council for determination, by inclusion of the program in Council's draft Revenue policy presently before Council, thereby dispensing with the requirement for public notice.
3. Resolves, that any reports requesting financial relief by commercial tenants be received in closed meeting as the requests will include commercial information of a confidential nature (i.e. business turnover) that if disclosed, prejudice the commercial position of the tenant who supplied the information.

### Background

#### **Commercial Properties**

Rous County Council owns two commercial properties in the Lismore CBD which are leased to different business entities to obtain a commercial return.

Council is also the head lessee of the Rous County Council Administration Centre, which accommodates Rous County Council headquarters and also receives commercial leasing revenue from sub-leased office accommodation space.

In response to the COVID-19 pandemic, on 7 April 2020 the National Cabinet released a Mandatory Code of Conduct regarding Small to Medium Enterprise Commercial Leasing during COVID-19 (the Code) (**Attachment 1**). The Code comes into effect from a date yet to be defined by the NSW Government, for the period during which the Commonwealth JobKeeper program remains operational (minimum of 6 months, at this time).

The NSW Government announced on 13 April 2020 that amongst other financial relief mechanisms for lessees and tenants, it will give effect to the Code which includes the following:

- Landlords must negotiate rent relief agreements with tenants in financial distress due to COVID-19 by applying the leasing principles in the Mandatory Code,
- A ban on the termination of a lease for non-payment of rent, and
- A freeze in rent increases.

The NSW Government has announced it will seek to give legal effect to the Code as soon as possible.

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It is important to note that the Code is mandatory, however is only intended to apply to commercial tenants:

- with a turnover of less than \$50 million that experience a 30 per cent (or more) reduction in revenue as a result of the COVID-19 pandemic.

Of particular importance to Council, under the Code, landlords must offer tenants proportionate relief in rent payable in the form of:

- 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.
- waivers must constitute no less than 50% of the total deferral in rent payable under the above over the COVID-19 pandemic period.

All requests for relief will be dealt with in accordance with the Code, in good faith, on a case by case basis, either by evidence of:

- Acceptance of receipt of the Commonwealth JobKeeper program
- Eligibility consistent with the Commonwealth JobKeeper program.

If a tenant's circumstances have not significantly changed due to COVID-19 they are still required to fulfil the terms of their existing agreements.

## **Governance**

### **Legal**

Section 377(1)(q) of the *Local Government Act 1993* does not allow a decision under section 356 to contribute money or otherwise grant financial assistance to a person to be delegated by Council.

However, section 356 of the Act allows Council to:

- Grant financial assistance in accordance with a resolution of Council (with 28 days public notice required for recipients who act for private gain) – section 356(1) and (2).

However, public notice may be dispensed with if the following criteria are met (section 356(3)):

1. The financial assistance is part of a specific program
2. The program's details are included in council's draft operational plan for the year the assistance is proposed
3. The program's proposed budget for that year does not exceed 5% of the council's proposed income from ordinary rates, and
4. The program applies uniformly to all persons within the council's area or to a significant group of persons within that area.

It is therefore submitted that by including reference to the Code within Council's draft 'Revenue' policy presently before Council (which forms part of Council's Operational Plan), the requirement for public notice may be dispensed with. Criterion 1, 2 and 4 are fulfilled by virtue of its proposed inclusion in the draft 'Revenue' policy, referencing the Code (a specific program) and it will apply to all persons within Council's area who hold a commercial lease with Council.

Criterion 3 is outlined in the *Finance* section below.

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It is also recommended that Council receive any reports requesting financial relief by commercial tenants be closed meeting under section 10A(2)(d)(i), as the requests for relief will include commercial information of a confidential nature such as business turnover, as the relief to be granted must be directly related to a loss in turnover/trade. This in turn, if disclosed, is likely to prejudice the commercial position of the tenant who supplied the information.

### **Finance**

If the scenario occurs that all of Council's current commercial tenants require 100% rental relief under the Code, this will result in 50% of rental income for Council's commercial properties being waived.

At worst, this would equal approximately \$134,600 for a 6-month period. Council's projected income from ordinary rates (in Council's case, bulk water revenue) is approximately \$17.9 million, thereby not exceeding 5% under criterion 3 above.

Staff will monitor these impacts as they become known and report any budget variations via individual reports and Council's subsequent Quarterly Budget Revenue Statements.

### **Other considerations provided for information only – residential rental properties.**

Council also owns a number of residential properties in the Dunoon area. On 13 April 2020, the NSW Government announced a six-month moratorium on new forced evictions if a residential tenant is in rental arrears because they are suffering financial hardship due to COVID-19. While final details are to be confirmed, it is reported that tenants who have lost 25% or more of their income will require a landlord or managing agent to enter into negotiations regarding rental payments. However, in contrast to the commercial tenancy Code outlined above, any unpaid rent will accrue as arrears.

Staff are continuing to work with Council's managing real estate agent in liaising with our tenants regarding any requests for rental relief. However, any consideration of financial assistance under section 356 of the Act is not applicable to residential tenancies at this time.

### **Consultation**

Council staff have been fielding requests from both commercial and residential tenants with respect to financial relief during the current COVID-19 pandemic. By including provision for the Mandatory Code within Council's current draft 'Revenue' policy, due to be publicly exhibited as part of Council's Draft delivery program/Operational plan, will enable external consultation regarding the proposed approach for commercial properties beyond 1 July 2020. Any relief proposed to be granted for the period up until 30 June 2020, will require 28 days' public notice.

### **Conclusion**

It is recommended that Council note the contents of this report and resolve to make the recommendations contained above.

Guy Bezrouchko  
Group Manager Corporate and Commercial

Attachments:

1. National Cabinet Mandatory Code of Conduct

## NATIONAL CABINET MANDATORY CODE OF CONDUCT

### SME COMMERCIAL LEASING PRINCIPLES DURING COVID-19

#### PURPOSE

The purpose of this Code of Conduct (“the Code”) 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 programme.

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 Coronavirus (“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, with an annual turnover of up to \$50 million (herein referred to as “SME tenants”).

The \$50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

The Parties to this Code concur that during the COVID-19 pandemic period, as defined by the period during which the JobKeeper programme is operational, the principles of this Code should nevertheless apply in spirit to all leasing arrangements for affected businesses, having fair regard to the size and financial structure of those businesses.

Appendix I gives examples of proportionate solutions that may be agreed under this Code, and forms part of the overall Code.

The Code has been developed to enable both a consistent national approach and timely, efficient application given the rapid and severe commercial impact of official responses to the COVID-19 pandemic.

#### PARTIES TO THE CODE

The Code will be given effect through relevant state and territory legislation or regulation as appropriate. The Code is not intended to supersede such legislation, but aims to complement it during the COVID-19 crisis period.

## **OVERARCHING PRINCIPLES**

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.

It is intended that landlords will agree tailored, bespoke and appropriate temporary arrangements for each SME tenant, taking into account their particular circumstances on a case-by-case basis.

The following overarching principles of this Code will apply in guiding such arrangements:

- Landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period.
- Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes.
- Landlords and tenants will negotiate in good faith.
- Landlords and tenants will 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 this Code.
- Any agreed arrangements will take into account the impact of the COVID-19 pandemic on the tenant, with specific regard to its revenue, expenses, and profitability. Such arrangements will be proportionate and appropriate based on the impact of the COVID-19 pandemic plus a reasonable recovery period.
- The Parties will assist each other in their respective dealings with other stakeholders including governments, utility companies, and banks/other financial institutions in order to achieve outcomes consistent with the objectives of this Code.
- All premises are different, as are their commercial arrangements; it is therefore not possible to form a collective industry position. All parties recognise the intended application, legal constraints and spirit of the Competition and Consumer Act 2010.
- The Parties will take into account the fact that the risk of default on commercial leases is ultimately (and already) borne by the landlord. The landlord must not seek to permanently mitigate this risk in negotiating temporary arrangements envisaged under this Code.

- All leases must be dealt with on a case-by-case basis, considering factors such as whether the SME tenant has suffered financial hardship due to the COVID-19 pandemic; whether the tenant's lease has expired or is soon to expire; and whether the tenant is in administration or receivership.
- Leases have different structures, different periods of tenure, and different mechanisms for determining rent. Leases may already be in arrears. Leases may already have expired and be in "hold-over." These factors should also be taken into account in formulating any temporary arrangements in line with this Code.
- As the objective of this Code is to mitigate the impact of the COVID-19 pandemic on the tenant, due regard should be given to whether the tenant is in administration or receivership, and the application of the Code modified accordingly.

## **LEASING PRINCIPLES**

In negotiating and enacting appropriate temporary arrangements under this Code, the following leasing principles should be applied as soon as practicable on a case-by-case basis:

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
2. Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under this Code.
3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under "definitions," below) 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.
4. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 above 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.
5. 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.

6. Any reduction in statutory charges (e.g. land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.

7. A landlord should seek to share any benefit it receives due to deferral of loan payments, provided by a financial institution as part of the Australian Bankers Association's COVID-19 response, or any other case-by-case deferral of loan repayments offered to other Landlords, with the tenant in a proportionate manner.

8. Landlords should where appropriate seek to waive recovery of any other expense (or outgoing payable) by a tenant, under lease terms, during the period the tenant is not able to trade. Landlords reserve the right to reduce services as required in such circumstances.

9. If negotiated arrangements under this Code necessitate repayment, this should occur over an extended period in order to avoid placing an undue financial burden on the tenant. No repayment should commence until the earlier of the COVID-19 pandemic ending (as defined by the Australian Government) or the existing lease expiring, and taking into account a reasonable subsequent recovery period.

10. No fees, interest or other charges should be applied with respect to rent waived in principles #3 and #4 above and no fees, charges nor punitive interest may be charged on deferrals in principles #3, #4 and #5 above.

11. Landlords must not draw on a tenant's security for the non-payment of rent (be this a cash bond, bank guarantee or personal guarantee) during the period of the COVID-19 pandemic and/or a reasonable subsequent recovery period.

12. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period outlined in item #2 above. This is intended to provide the tenant additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic concludes.

13. 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.

14. Landlords may not apply any prohibition on levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

## **BINDING MEDIATION**

Where landlords and tenants cannot reach agreement on leasing arrangements (as a direct result of the COVID-19 pandemic), the matter should be referred and subjected (by either party) to applicable state or

territory retail/commercial leasing dispute resolution processes for binding mediation, including Small Business Commissioners/Champions/Ombudsmen where applicable.

Landlords and tenants must not use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.

## **DEFINITIONS**

The following definitions are provided for reference in the application of this Code.

1. Financial Stress or Hardship: an individual, business or company's inability to generate sufficient revenue as a direct result of the COVID-19 pandemic (including government-mandated trading restrictions) that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments. SME tenants which are eligible for the federal government's JobKeeper payment are automatically considered to be in financial distress under this Code.
2. Sufficient and accurate information: this includes 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.
3. Waiver and deferral: any reference to waiver and deferral may also be interpreted to include other forms of agreed variations to existing leases (such as deferral, pausing and/or hibernating the lease), or any other such commercial outcome of agreements reached between the parties. Any amount of reduction provided by a waiver may not be recouped by the Landlord over the term of the lease.
4. Proportionate: the amount of rent relief proportionate to the reduction in trade as a result of the COVID-19 pandemic plus a subsequent reasonable recovery period, consistent with assessments undertaken for eligibility for the Commonwealth's JobKeeper programme.

## **CODE ADMINISTRATION COMMITTEE**

This Code will be supported by state based Industry Code Administration Committees, comprising representatives from relevant industry bodies representing landlord, tenant and SME interests, with an Independent Chair appointed by the relevant State/Territory Government.

Committee members' roles will be to (1) promote awareness of the Code; (2) encourage application of the Code; (3) encourage its application by the broader retail industry; and (4) monitor the operation of the Code.

The Committee should meet at least fortnightly, and may communicate and meet via email, telephone calls, or video conferencing.

No formal minutes will be taken; however, the Committee will document key action items and outcomes of each meeting.

The Committee may invite advisers, upon agreement by all Committee members, to assist on specific issues in the course of discharging their obligations under this section.

## **COMMENCEMENT/EXPIRY**

This Code comes into effect in all states and territories from a date following 3 April 2020 (being the date that National Cabinet agreed to a set of principles to guide the Code to govern commercial tenancies as affected by the COVID-19 pandemic) to be defined by each jurisdiction, for the period during which the Commonwealth JobKeeper program remains operational.

## APPENDIX I

### EXAMPLES OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

The following scenarios are examples only, noting the circumstance of each landlord, SME tenant and lease are different, and are subject to negotiation and agreement in good faith.

Examples of practical variations reflecting the application of the principle of proportionality may include, but are not limited to:

- Qualifying tenants would be provided with cash flow relief in proportion to the loss of turnover they have experienced from the COVID-19 crisis
  - ie. a 60% loss in turnover would result in a guaranteed 60% cash flow relief.
  - At a minimum, half is provided as rent free/rent waiver for the proportion of which the qualifying tenant's revenue has fallen.
  - Up to half could be through a deferral of rent, with this to be recouped over 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.
  - The parties would be free to make an alternative commercial arrangement to this formula if that is their wish.