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fact sheet

for property managers

6 November 2020

The National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19

This fact sheet focuses on the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19 (**the Code**), how it has been implemented in the States and Territories and the Commonwealth's own policy towards its tenants and licensees.

Note that this fact sheet is based on the law as at the date of publication. Circumstances are rapidly changing and the Commonwealth, States and Territories are each passing legislation and making regulations and declarations to respond to the evolving situation. These responses may be temporary and might include modifications to earlier legislation, regulations and/or declarations relevant to commercial tenancies. The Appendix to this fact sheet summarises the implementation of the leasing principles in the Code by State and Territory.

Summary of the Code

The stated purpose of 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.'

The Code contains:

- **eleven overarching principles** – dealing with issues such as good faith negotiations, the provision of accurate information between parties and the unique nature of individual leases (which should be taken into account in formulating any temporary arrangements)
- **fourteen leasing principles** to be applied as soon as practicable on a case-by-case basis – including a prohibition on the termination of leases due to the non-payment of rent during the pandemic period, waivers and deferrals of rent, and a freeze on rent increases (except for retail leases based on turnover rent)
- **two paragraphs regarding binding mediation** where landlords and tenants cannot reach agreement on leasing arrangements (as a direct result of the pandemic).

How is the Commonwealth dealing with its own tenants and sub-tenants?

Non-corporate and Corporate Commonwealth entity leases to certain tenants and licensees

The Commonwealth Government announced on 7 April 2020 that it is not claiming rent for all its small and medium enterprises and not-for-profit tenants, subtenants and licensees that lease or licence from non-corporate Commonwealth entities¹.

This policy applies from 24 March 2020 and will continue until the Australian Government lifts restrictions that are currently in place to slow the spread of COVID-19. The types of business in scope of the policy include:

- cafes and restaurants
- childcare operators
- retail and local service providers
- community organisations
- educational institutions.

The policy includes a mutual obligation requirement on the small and medium-sized enterprises and not-for-profit tenants to continue to engage their employees through the JobKeeper initiative where eligible, and if applicable, provide rent relief to their subtenants and licensees.

Queries from tenants relating to the Code

Commonwealth entities may also be contacted in relation to leasing issues other than rent – such as outgoings, security bonds, a variation to the term of a lease and other terms and conditions.

As stated in the COVID-19 – Procurement Policy Note:²

- contract managers are expected to maintain their relationships with suppliers and to manage any specific issues arising as a result of COVID-19 in a collaborative and sensible manner
- in this context, when considering possible options with suppliers, entities should consider the requirement in the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) to ensure that public resources are used in an efficient, effective, economical and ethical manner
- consistent with those requirements, entities can where appropriate and possible, work with suppliers to ensure business continuity is maintained by providing relief (such as agreeing that termination rights will not be exercised or liquidated damages will not be claimed), varying the contract or waiving specified requirements to address the COVID-19 circumstances
- changes to the terms of a contract should be limited to the specific circumstances of the situation, and considered on a case-by-case basis. Entities should ensure that appropriate records are kept in relation to contractual changes and the reasons behind them.

It will be relevant for the Commonwealth landlord or licensor to consider the implementation of the Code in the State or Territory where the leased premises are located.

The Appendix to this fact sheet identifies some of the key differences between the leasing principles in the Code and how it has been implemented in the States and Territories. As a result of these differences, Commonwealth landlords should not take a ‘one-size-fits-all’ approach to implementing the Code in tenancies throughout Australia, but should be aware of the State or Territory-specific approach to the issues raised by the Code and how it has (or has not been) legislated. It is also important for

¹ The <https://www.financeminister.gov.au/media-release/2020/04/07/rent-relief-available-tenants-commonwealth-properties#:~:text=The%20Commonwealth%20Government%20will%20waive,and%20leased%20property%20across%20Australia.&text=The%20rent%20relief%20will%20continue,the%20spread%20of%20COVID%2D19>.

² <https://www.finance.gov.au/government/procurement/covid-19-procurement-policy-note>.

Commonwealth landlords to be aware which leases are subject to the relevant legislation in a State or Territory, as not all leases are covered (and which leases are covered is different between the States and Territories).

The Appendix also sets out the overarching principles from the Code.

When dealing with leases and licences, how to vary the document will need to be considered. It is common for leases to be documented in the form of a deed. Where this is the case, it is usually necessary to ensure that any amendments are also in the form of a deed. In some circumstances, a letter reducing rent for the relevant period and imposing mutual obligations can be used instead of a deed. There may also be registration requirements that will apply – these vary from jurisdiction to jurisdiction and a failure to comply with these requirements could impact on the enforceability of the amendments. It is therefore appropriate to obtain legal advice to ensure that any amendment is appropriately documented and enforceable.

This fact sheet does not consider constitutional issues and the extent to which Commonwealth landlords are bound to comply with State and Territory laws implementing the Code. AGS can provide advice on this issue to Commonwealth landlords with questions relevant to this issue.

More information

If you require further information about the implementation of the Code and any issues regarding a lease, sublease or licence (particularly during the COVID-19 pandemic), please contact:

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Appendix

Mandatory National Code Overarching Principles (OP)

OP 1	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.
OP 2	Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually-satisfactory outcomes.
OP 3	Landlords and tenants will negotiate in good faith.
OP 4	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.
OP 5	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.
OP 6	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.
OP 7	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 <i>Competition and Consumer Act 2010</i> .
OP 8	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.
OP 9	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.
OP 10	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.
OP 11	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.

The National Code	ACT	NSW	Tas	QLD	VIC	WA	SA	NT
What is the key legislation implementing the National Code?	Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No 2) (ACT Declaration). The Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020, which has been repealed, continues to apply to a prescribed breach by a former impacted tenant between 1 April 2020 and 27 September 2020 – s 10 of the ACT Declaration.	Retail and Other Commercial Leases (COVID-19) Regulation 2020 (ROCL Regs). Conveyancing (General) Regulation 2018 (Conv Regs).	Covid-19 Disease Emergency (Commercial Leases) Act 2020 (TAS Act). Covid-19 Disease Emergency (Miscellaneous Provisions) Act 2020.	COVID-19 Emergency Response Act 2020 (QLD Act). Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (QLD Regs). As well, additional regulations have been made to create a scheme for the waiver or deferral of rent for leases, licences and permits to occupy governed by the Land Act 1994 (QLD) which is the Land (COVID-19 Emergency Response – Waiver and Deferral of Rents and Instalments) Regulation 2020. These regulations are not summarised in this table.	COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic Act). COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 (Vic Regs).	Commercial Tenancies (COVID-19 Response) Act 2020 (WA Act). Commercial Tenancies (COVID-19 Response) Regulations 2020 (WA Regs). Code of Conduct in Schedule 1 of the WA Regs (WA Code).	COVID-19 Emergency Response Act 2020 (SA Act). COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020 (SA Regs).	Business Tenancies (Fair Dealings) Act 2003 (BT(FD) Act). Business Tenancies COVID-19 Modification Notice 2020 (Notice).
Relevant period	28 September 2020 to the earlier of: - either the first day no COVID-19 emergency is in force, or a later day notified by the Minister - 31 January 2021.	The 'prescribed period' is 24 April 2020 – 24 October 2020. The NSW Government has recently announced that the ROCL Regs will be extended until 31 December 2020.	The TAS Act refers to the 'financial hardship period' which is 1 April 2020 until 2 June 2021 (or earlier as determined by the Treasurer).	The QLD Regs refer to the 'response period' of 29 March 2020 to 30 September 2020. There is also an 'extension period' of 1 October 2020 to 31 December 2020.	The Vic Regs refer to the 'relevant period' which is 29 March 2020 to 31 December 2020.	The WA Regs and WA Act refer to an 'emergency period' which is 30 March 2020 until 28 March 2021.	The SA Regs refer to a 'prescribed period' which is one or both of the following: - 30 March 2020 to 30 September 2020 ('period 1') - 1 October 2020 to 3 January 2021 ('period 2').	The Notice has effect during the 'emergency period' which is: - while the COVID-19 public health emergency is declared under s 48 of the Public and Environmental Health Act 2011 (NT) - while a declaration under ss 18, 19 or 21 of the Emergency Management Act 2013 (NT) regarding COVID-19 is in force.

<i>The National Code (cont.)</i>	<i>ACT</i>	<i>NSW</i>	<i>Tas</i>	<i>QLD</i>	<i>VIC</i>	<i>WA</i>	<i>SA</i>	<i>NT</i>
<p>Eligible leases – The 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 (SME tenants). This applies in respect of:</p> <ul style="list-style-type: none"> - franchises at the franchisee level - retail corporate groups at the group level (rather than at the individual retail outlet level). 	<p>The ACT Declaration refers to an ‘impacted tenant’ which is as per the National Code. An impacted tenant must qualify for the Commonwealth JobKeeper program as in force on 28 September 2020. The Lease must have been entered into before 7 April 2020 – s 5(1) of the ACT Declaration.</p>	<p>Both NSW Regulations refer to an ‘impacted lessee’ which aligns with the tenancies included in the National Code.</p> <p>Both NSW Regulations refer to ‘commercial leases’. In the:</p> <ul style="list-style-type: none"> - Conv Regs – this is any agreement to which the <i>Conveyancing Act 1919</i> (NSW) applies relating to a lease for commercial purposes - ROCL Regs – this is a retail shop lease. <p>In both regulations, ‘commercial lease’ excludes leases entered into after 24 April 2020 (except for leases entered into by an option to extend or renew an existing lease on the same terms as the existing lease) and leases under the <i>Agricultural Tenancies Act 1990</i>.</p> <p>The ROCL Regs also exclude commercial leases as defined by the Conv Regs, and the Conv Regs exclude retail shop leases.</p>	<p>The TAS Act refers to a ‘protected lease’ and an ‘eligible person’, which align with tenancies included in the National Code – see ss 5(1) and 6(1) of the TAS Act.</p> <p>The Lease must be a ‘commercial lease’, whether entered into before or during the financial hardship period and whether or not the Lease is entered into pursuant to an option or renewal of a commercial lease – s 9(3) of the TAS Act. A commercial lease must be subject to Schedule 1 to the <i>Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998</i> and be for premises occupied wholly or predominately for business purposes (but does not include prescribed leases).</p>	<p>The QLD Regs refer to an ‘affected lease’ which aligns with tenancies included in the National Code – see reg 5 of the QLD Regs.</p> <p>In addition, an affected lease must be:</p> <ul style="list-style-type: none"> - a retail shop lease or a Lease for premises to be wholly or predominately used for carrying on a business (for a non-profit Tenant, the leased premises is used for the carrying on of the operations or activities by the Tenant) - binding on the tenant (whether or not it has commenced on 28 May 2020). <p>There are limited exceptions, including leases for certain farming businesses or certain leases, permits, licences or subleases under the <i>Land Act 1994</i> (QLD).</p> <p>A Lease is an affected lease during the extension period only if the Tenant (or other specified entity) is eligible for the JobKeeper program for the period starting on 28 September 2020 and ending on 4 January 2021. See reg 5 of the QLD Regs.</p>	<p>The Vic Regs refer to an ‘eligible lease’, which is a retail lease or a non-retail commercial lease or licence under which the tenant is an SME entity and is entitled under ss 6, 11 or 12A of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to a JobKeeper payment.</p> <p>The eligible lease must be in effect on 29 March 2020.</p> <p>Some farming and agricultural leases and certain other leases/licences are not included.</p>	<p>The WA Regs refer to an ‘eligible tenant’ which has similar requirements as the National Code, with some differences in the criteria depending on the timing during the emergency period – cl 2 of the WA Code.</p> <p>In addition, the WA Regs refer to a ‘relevant small commercial lease’, which is:</p> <ul style="list-style-type: none"> - a retail shop lease - a lease of premises used for a small business - a lease granted to an incorporated association - a lease where the Tenant is a corporation registered under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> and uses the premises for a commercial purpose. 	<p>The SA Regs refer to an ‘affected lessee’ which aligns with the National Code.</p> <p>In addition, the SA Regs refer to a ‘commercial lease’ which is:</p> <ul style="list-style-type: none"> - a retail shop lease - a lease under the <i>Landlord and Tenant Act 1936</i> (SA) - any other agreement to occupy premises to carry on a business but excludes certain pastoral and Crown leases – reg 3(1) of the SA Regs. <p>The SA Regs do not apply to Leases entered into after 30 March 2020 (unless that Lease was an extension/renewal of an existing Lease on the same/ substantially similar terms as the existing Lease – reg 5(1) of the SA Regs.</p>	<p>The Notice refers broadly to Landlords and Tenants – this would apply to Leases subject to the BT(FD) Act.</p>

<i>Leasing principles (LP)</i>	<i>ACT</i>	<i>NSW</i>	<i>Tas</i>	<i>QLD</i>	<i>VIC</i>	<i>WA</i>	<i>SA</i>	<i>NT</i>
<p>LP 1 Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).</p>	<p>There is no absolute prohibition on termination, although a Landlord must not give a termination notice to an impacted tenant in relation to a prescribed breach (which includes a failure to pay rent during the prescribed period) unless the Landlord has engaged in good faith negotiations with the Tenant. A termination notice given in contravention of this prohibition is void – s 8 of the ACT Declaration. Good faith negotiations require ‘having regard’ to the overarching principles and leasing principles in the National Code – s 6(1) of the ACT Declaration.</p> <p>A Landlord may terminate the Lease or take a prescribed action against an impacted tenant if the Tenant agrees to the termination or action, or the Landlord has engaged in good faith negotiations with the Tenant and the Tenant surrenders the Lease – s 7(2) of the ACT Declaration.</p>	<p>The prohibition applies during the prescribed period where the Tenant is an impacted lessee.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on ‘prescribed action’ by the Landlord. As well as termination of the commercial lease, ‘prescribed action’ also includes 11 other prohibited actions - also applies to 2 other breaches of the commercial lease (as well as a failure to pay rent) – being a failure to pay outgoings or the business not being open during the hours specified in the Lease. <p>See reg 6 of the ROCL Regs and cl 4 of Sch 5 of the Conv Regs.</p> <p>However, there is a procedure for rent and other terms of the Lease to be renegotiated by the parties in good faith. A Landlord under an impacted lease must not take or continue any prescribed action against an impacted lessee due to a failure to pay rent during the prescribed period unless the Landlord has complied with this procedure – reg 7 of the ROCL Regs and cl 5 of Sch 5 of the Conv Regs.</p> <p>Until the Small Business Commissioner has certified that mediation has failed to resolve a dispute and given reasons for the failure, a Landlord must not seek to recover possession of the premises, terminate the Lease or enforce any other right of the Landlord under the Lease – see cl 6 of Sch 5 of the Conv Regs.</p>	<p>The prohibition applies to a protected lease during the financial hardship period.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on ‘prohibited lessor action’ by the Landlord (which includes termination of the Lease as well as other actions) - applies to a breach of the Lease during the financial hardship period because of a failure to pay rent, fees, levies or charges (as well as other breaches, such as a failure to pay outgoings or the business not being open during the hours and days specified in the Lease) – s 13 of the TAS Act. <p>There is also a Notice issued under s 22 of the <i>Covid-19 Disease Emergency (Miscellaneous Provisions) Act 2020</i> which provides that during the emergency period a Landlord cannot terminate a commercial lease for unpaid rent or other moneys with a Tenant that has business turnover of less than \$50 million where that business is also eligible for the Commonwealth Government’s JobKeeper program. This applies to any commercial lease that was in place at 1 February 2020 or which commenced prior to 9 April 2020.</p>	<p>The prohibition applies to affected leases and:</p> <ul style="list-style-type: none"> - is on ‘prescribed action’ by the Landlord. As well as termination of the Lease, ‘prescribed action’ also includes other prescribed actions - also applies to 2 other breaches of the Lease (as well as a failure to pay rent wholly/partly during the response period or extension period) – being a failure to pay outgoings wholly/partly during the response period or extension period or the business at the leased premises not being open for required hours. <p>There are limited exceptions where the Landlord may take a prescribed action, such as:</p> <ul style="list-style-type: none"> - in accordance with a variation of the lease under Div 3, a settlement agreement or court order - if, despite the Landlord’s genuine attempt to negotiate the rent and terms of the Lease, the Tenant has substantially failed to comply with its obligations in relation to negotiations - on a ground that is not related to the effects of the COVID-19 emergency. <p>See reg 12 QLD Regs.</p> <p>The parties can contract out of these provisions – reg 10 of the QLD Regs.</p>	<p>Similar to the National Code. A difference is that to receive this protection, during the relevant period a Tenant under an eligible lease must comply with the procedure to request rent relief or it must pay rent in accordance with a variation to the Lease or other agreement – reg 9 of the Vic Regs.</p>	<p>The prohibition applies during the emergency period.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on ‘prohibited action’ by the Landlord (which includes termination of the small commercial lease as well as other actions) - applies to a breach of the small commercial lease during the emergency period because of the Tenant’s failure to pay rent or other money due under the Lease, the business is not open for the required hours, or any act or omission prescribed by regulations – s 9 of the WA Act. <p>From 30 September 2020, there are exceptions to the prohibition, such as where the Tenant is insolvent when the prohibited action is taken, and where the Tenant has not made a request for rent relief in relation to unpaid rent relating to the breach – reg 2D of the WA Regs.</p>	<p>The prohibition applies during the prescribed period where the Tenant is an affected lessee.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on ‘prescribed action’ by the Landlord (which includes termination of the Lease as well as other actions) - applies to a breach of the Lease by the Tenant during the prescribed period because of a failure to pay rent or outgoings or the business not being open for the required hours. <p>There is a limited exception to the prohibition where the breach is non-payment of rent in breach of a mediation agreement or Court order, and this depends on the timing during period 1 or period 2. A Landlord may take a prescribed action against a Tenant in respect of a breach of a commercial lease that occurred:</p> <ul style="list-style-type: none"> - with a Tenant who is an affected lessee in period 1 – before 30 March 2020 - with a Tenant who is an affected lessee in period 2 but not period 1 – before 1 October 2020. <p>Regulation 7 of the SA Regs.</p>	<p>Different to the National Code. A Landlord must not give a Tenant a notice to quit unless the Landlord has, for at least 30 business days, made good faith efforts to negotiate with the Tenant to allow the Tenant to remain in the premises.</p> <p>Exceptions are a notice to quit:</p> <ul style="list-style-type: none"> - relating to ‘drug premises’ (see <i>Misuse of Drugs Act 1990</i> (NT)) - given in the reasonable belief that the Tenant engaged or intends to engage in illegal conduct on the premises or conduct that caused or will cause substantial damage to the premises contrary to the business lease. <p>If a business lease requires negotiations or an alternative dispute resolution process between the Landlord and Tenant before a notice to quit can be given:</p> <ul style="list-style-type: none"> - those requirements continue to have effect to the extent they are not contrary to the prohibition outlined above - the negotiation period must run concurrently with any period for the negotiation or alternative dispute resolution process - Section 3 of the Notice.

Leasing principles (cont.)	ACT	NSW	Tas	QLD	VIC	WA	SA	NT
LP 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 the Code.	Not expressly addressed.	This is not expressly legislated, however a Landlord is not prevented from taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic (such as terminating the Lease because the Tenant has breached the Lease by damaging the premises, or taking action because the Tenant failed to vacate the premises after the expiry of the Lease) – See reg 10 in the ROCL Regs and cl 8 in Sch 5 of the Conv Regs.	Not expressly legislated.	This is not expressly stated, however, Landlords are not prevented from taking a prescribed action on a ground that is not related to the effects of the COVID-19 emergency – reg 12(2)(c) of the QLD Regs.	Different to the National Code. A Tenant under an eligible lease receives certain protections during the relevant period from termination of the Lease and recourse to security by the Landlord if it complies with the procedure to request rent relief or it pays rent in accordance with a varied lease or other agreement – reg 9 of the Vic Regs.	Not expressly legislated.	Not expressly legislated.	Not expressly addressed by the Notice.
LP 3 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.	Not expressly addressed.	Similar to the National Code, except that negotiating parties must only have 'regard to' the economic impacts of the COVID-19 pandemic and the leasing principles set out in the National Code – See reg 7(4) of the ROCL Regs and cl 5(4) of Sch 5 of the Conv Regs.	There is no express reference to proportionate reductions of rent by waivers and deferrals. Instead, a party to a protected lease may request the rent be renegotiated. Negotiation is to have 'regard' to the leasing principles in the National Code, any matters in s 12(2) of the TAS Act (which refer to the degree of financial hardship, whether the lease is expired, in holding over, about to expire and whether either party is in administration/receivership) and any prescribed matters – s 18 of the TAS Act. A Tenant may, in writing, contract out of the requirement for rent renegotiation – s 18(4) of the TAS Act.	Not expressly legislated. However, the Landlord's rent offer 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 leased premises during the response period or extension period – reg 15(2)(c) of the QLD Regs.	Similar to the National Code for eligible leases. The Landlord's offer must relate to the rent payable under the eligible lease during the period starting on the date of the Tenant's request and ending on 31 December 2020. In addition, the Landlord's offer must be, at a minimum, proportional to the decline in the Tenant's turnover at the premises consistent with the requirements in the Vic Regs – reg 10(4) of the Vic Regs.	Similar to the National Code for eligible tenants. Differences include: - a requirement for an eligible tenant to provide specified information (such as evidence of reduced turnover) with its request for rent relief – cl 5(2) of the WA Code - the Landlord must offer rent relief in response to a compliant request within 14 days after receiving the request or such other agreed period – cl 6 of the WA Code - a requirement that the rent relief be adjusted from time to time (but not more than monthly) to take into account any variation in the reduction in the eligible tenant's turnover (unless otherwise agreed) – cl 7(3A) of the WA Code.	Not expressly legislated, however the parties must negotiate having regard to the National Code – reg 6 of the SA Regs. In addition, the Magistrates Court may make orders, including orders for rent relief, which includes rent waivers and deferrals (as well as any other orders the Court thinks necessary or desirable to resolve a dispute) – reg 9(5) of the SA Regs.	Not expressly addressed by the Notice.
LP 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.	Not expressly addressed.	Similar to the National Code, except that negotiating parties must only have 'regard to' the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code – See reg 7(4) of the ROCL Regs and cl 5(4) of Sch 5 of the Conv Regs.	Not expressly legislated. However, the parties to a protected lease are to renegotiate the rent having regard to the leasing principles in the National Code – s 18(3) of the TAS Act.	During the response period – the Landlord's offer must provide for no less than 50% of a rent reduction to be in the form of a rent waiver. During the extension period – there is no requirement that the offer of a rent reduction must be in the form of a rent waiver. See reg 15 of the QLD Regs.	Similar to the National Code for eligible leases. There is no reference to the Landlord's financial ability to provide additional waivers – reg 10(4) of the Vic Regs.	Very similar to the National Code – cl 7 of the WA Code.	Not expressly legislated, however the parties must negotiate having regard to the National Code – reg 6 of the SA Regs. If the Magistrates Court makes an order granting rent relief to an affected lessee, then at least 50% of the relief must be in the form of a rent waiver. The Court may also make any other orders the Court thinks necessary or desirable to resolve a dispute – regs 9(5) and 9(7) of the SA Regs.	Not expressly addressed by the Notice.
LP 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.	Not expressly addressed.	Similar to the National Code, except that negotiating parties must only have 'regard to' the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code – See reg 7(4) of the ROCL Regs and cl 5(4) of Sch 5 of the Conv Regs.	Not expressly legislated. However, the parties to a protected lease are to renegotiate the rent having regard to the leasing principles in the National Code – s 18(3) of the TAS Act.	Some difference to the National Code. If the parties to an affected lease agree to defer rent payment – payment of the deferred rent must be amortised using a method agreed between the parties over a period of at least 2 years but no more than 3 years (with the start date depending on whether the deferred rent relates to the response period or the extension period) – reg 17(2) of the QLD Regs.	Very similar to the National Code for eligible leases. Deferred rent must be amortised over the greater of: - the balance of the term (including any extension to that term) - a period of at least 24 months. However, the Landlord and Tenant may agree otherwise in writing. Regulation 16(2)(b) of the Vic Regs.	As per the National Code – cl 9 of the WA Code.	Not expressly legislated, however the parties must negotiate having regard to the National Code – reg 6 of the SA Regs.	Not expressly addressed by the Notice.

Leasing principles (cont.)	ACT	NSW	Tas	QLD	VIC	WA	SA	NT
LP 6 Any reduction in statutory charges (eg land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.	Not expressly addressed.	As per the National Code, where the Tenant is an impacted lessee – cl 4(4) of Sch 5 of the Conv Regs and and reg 6(4) of the ROCL Regs.	Not expressly legislated.	Different to the National Code. A Landlord's rent offer must only 'have regard to' if a portion of rent or another amount payable under the affected lease represents an amount for land tax, local government rates, statutory charges, insurance premiums or other outgoings, and any reduction in, or waiver of, those charges – reg 15(2)(c)(iv) of the QLD Regs.	As per the National Code for eligible leases. In addition, if a Tenant has already paid an amount greater than its proportional share of the reduced outgoings, the Landlord must reimburse the excess amount to the Tenant as soon as possible – reg 15(2)(b) of the Vic Regs.	Very similar to the National Code. In addition, if an eligible tenant has already paid an amount greater than its proportional share of the reduced outgoings, the Landlord must reimburse the excess amount to the eligible tenant as soon as possible – cl 12 of the WA Code.	No land tax is to be paid or reimbursed by an affected lessee during the applicable prescribed period – reg 7(5) of the SA Regs. If the Landlord receives a waiver of land tax or a payment to relieve land tax, the Landlord must pass on the benefit of the waiver or payment by a rent waiver to an affected lessee in accordance with the provisions of the relevant scheme – reg 7(7) of the SA Regs.	Not expressly addressed by the Notice.
LP 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.	Not expressly addressed.	Similar to the National Code, except that negotiating parties must only have 'regard to' the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code – See reg 7(4) of the ROCL regs and cl 5(4) of the Conv Regs.	Not expressly legislated.	Not expressly legislated.	Not expressly legislated.	Not expressly legislated.	Not expressly legislated, however the parties must negotiate having regard to: - the economic impacts of the COVID-19 pandemic on the parties - the provisions of the SA Act and the SA Regs - the National Code. Regulation 6 of the SA Regs.	Not expressly addressed by the Notice.
LP 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.	Not expressly addressed.	Similar to the National Code, except that negotiating parties must only have 'regard to' the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code – See reg 7(4) of the ROCL Regs and cl 5(4) of the Conv Regs.	Not expressly legislated.	No express provision for Landlords to waive expenses or outgoings. However, a Landlord under an affected lease may cease or reduce services if the Tenant is unable to operate its business at the premises, to the extent it is reasonable and subject to any reasonable request by the Tenant – reg 19 of the QLD Regs.	Similar to the National Code. However, the obligation under an eligible lease is that the Landlord 'must consider waiving' outgoings or other expenses. Also, a reduction of services must be reasonable in the circumstances and be in accordance with any reasonable request of the Tenant – reg 14 of the Vic Regs.	Very similar to the National Code. Differences include: - the Landlord 'must consider waiving recovery...', which is less onerous than the National Code - the Landlord's right to cease or reduce providing services is to be reasonable in the circumstances and in accordance with any reasonable request of the eligible tenant – cl 11 of the WA Code.	Not expressly legislated, however the parties must negotiate having regard to: - the economic impacts of the COVID-19 pandemic on the parties - the provisions of the SA Act and the SA Regs - the National Code. Regulation 6 of the SA Regs.	Not expressly addressed by the Notice.
LP 9 If negotiated arrangements under the 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.	Not expressly addressed.	Similar to the National Code, except that negotiating parties must only have 'regard to' the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code – See reg 7(4) of the ROCL Regs and cl 5(4) of the Conv Regs.	Not expressly legislated. However, the parties to a protected lease are to renegotiate the rent having regard to the leasing principles in the National Code – s 18(3) of the TAS Act.	Where the parties to an affected lease have agreed to defer payment of rent – payment of deferred rent must not be required until 1 October 2020 (to the extent the deferred rent relates to the response period) or until 1 January 2021 (to the extent the deferred rent relates to the extension period) – reg 17(2)(a) of the QLD Regs.	Similar to the National Code. A Landlord must not request payment of deferred rent under the eligible lease until 31 December 2020. However, the Landlord and Tenant may agree otherwise in writing – regs 16(2)(a) and (4) of the Vic Regs.	Some similarity to the National Code. The Landlord must not request payment of deferred rent until the earlier of the end of the emergency period and the expiry of the term of the small commercial lease (before any extension to the term or otherwise). The Landlord and the Tenant may agree otherwise in writing – cl 9 of the WA Code.	Not expressly legislated, however the parties must negotiate having regard to: - the economic impacts of the COVID-19 pandemic on the parties - the provisions of the SA Act and the SA Regs - the National Code. Regulation 6 of the SA Regs. The Magistrates Court may make an order that payment of rent be deferred for a specified period not exceeding 24 months from the day on which the order is made (as well as any other order the Court thinks necessary or desirable to resolve a dispute) – reg 9(5) of the SA Regs.	Not expressly addressed by the Notice.

Leasing principles (cont.)	ACT	NSW	Tas	QLD	VIC	WA	SA	NT
<p>LP 10 No fees, interest or other charges should be applied with respect to rent waived in leasing principles (LP) #3 and #4 above and no fees, charges nor punitive interest may be charged on deferrals in principles #3, #4 and #5 above.</p>	<p>A Landlord must not take a prescribed action (which includes requiring payment of penalty interest on, or a fee or charge related to unpaid rent) against an impacted tenant in relation to a prescribed breach unless the Landlord has engaged in good faith negotiations with the Tenant in relation to the breach – s 9 of the ACT Declaration.</p> <p>A Landlord may take a prescribed action against an impacted tenant if the Tenant agrees to the action, or the Landlord has engaged in good faith negotiations with the Tenant and the Tenant surrenders the Lease – s 7 of the ACT Declaration.</p>	<p>Similar to the National Code, except that negotiating parties must only have 'regard to' the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code – See reg 7(4) of the ROCL Regs and cl 5(4) of Sch 5 of the Conv Regs.</p>	<p>Not expressly legislated.</p>	<p>Similar to the National Code. A Landlord must not require the Tenant to pay interest or other fees in relation to deferred rent unless the Tenant fails to comply with the conditions on which the rent is deferred – reg 17(2)(c) of the QLD Regs.</p>	<p>As per the National Code, for an eligible lease – reg 17 of the Vic Regs.</p>	<p>The prohibition applies during the emergency period.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on 'prohibited action' by the Landlord (which includes requiring a payment of interest on unpaid rent or other money such as operating expenses) - applies to a breach of the Lease during the emergency period because of the Tenant's failure to pay rent or other money due under the Lease (as well as other breaches, being the business is not open for the required hours, or any act or omission prescribed by regulations) – s 9 of the WA Act. <p>From 30 September 2020, there are exceptions to the prohibition, such as where the Tenant is insolvent when the prohibited action is taken, and where the Tenant has not made a request for rent relief in relation to unpaid rent relating to the breach – reg 2D of the WA Regs.</p>	<p>The prohibition applies during the applicable prescribed period, where the Tenant is an affected lessee.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on 'prescribed action' by the Landlord (which includes requiring a payment of interest on unpaid rent otherwise payable by a Tenant as well as other actions) - applies to a breach of the Lease by the Tenant during the prescribed period because of a failure to pay rent or outgoings or the business not being open for the required hours. <p>There is a limited exception to the prohibition where the breach is non-payment of rent in breach of a mediation agreement or Court order, and this depends on the timing during period 1 or period 2.</p> <p>A Landlord may take a prescribed action against a Tenant in respect of a breach of a commercial lease that occurred:</p> <ul style="list-style-type: none"> - with a Tenant who is an affected lessee in period 1 – before 30 March 2020 - with a Tenant who is an affected lessee in period 2 but not period 1 – before 1 October 2020. <p>Regulation 7 of the SA Regs.</p>	<p>Not expressly addressed by the Notice.</p>
<p>LP 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.</p>	<p>Landlords must first engage in good faith negotiations with an impacted tenant before taking a prescribed action (which includes recovery of the whole or part of a security bond under the Lease) in relation to a prescribed breach – s 9 of the ACT Declaration.</p> <p>A prescribed breach is a failure by an impacted tenant during the prescribed period to pay rent, outgoings/other amounts or to operate the business during the hours required by the Lease – s 5(1) of the ACT Declaration.</p> <p>Good faith negotiations require 'having regard' to the overarching principles and leasing principles in the National Code – s 6(1) of the ACT Declaration.</p> <p>A Landlord may take a prescribed action against an impacted tenant if the Tenant agrees to the action, or the Landlord has engaged in good faith negotiations with the Tenant and the Tenant surrenders the Lease – s 7 of the ACT Declaration.</p>	<p>The prohibition applies during the prescribed period where the Tenant is an impacted lessee.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on 'prescribed action' by the Landlord. As well as a prohibition on recovery of the whole or part of a security bond, 'prescribed action' also includes 11 other prohibited actions - also applies to 2 other breaches of the commercial lease (as well as a failure to pay rent) – being a failure to pay outgoings or the business not being open during the hours specified in the Lease. <p>See reg 6 of the ROCL Regs and cl 4 of Sch 5 of the Conv Regs.</p> <p>However, there is a procedure for rent and other terms of the Lease to be renegotiated by the parties in good faith. A Landlord under an impacted lease must not take or continue any prescribed action against an impacted lessee due to a failure to pay rent during the prescribed period unless the Landlord has complied with this procedure – reg 7 of the ROCL Regs and cl 5 of Sch 5 of the Conv Regs.</p> <p>A Landlord must not seek to recover possession of the premises, terminate the Lease or exercise or enforce any other of its rights under the Lease unless the Small Business Commissioner has certified that mediation has failed to resolve the dispute and given reasons for the failure – see cl 6 of Sch 5 of the Conv Regs.</p>	<p>Similar to the National Code. The Landlord in a protected lease must not take a 'prohibited lessor action' (such as recovering the whole or part of a security bond, or bank guarantee, under or in relation to the Lease) during or after the financial hardship period because of a specified breach by a Tenant in a protected lease (such as a failure to pay rent, outgoings etc) during the financial hardship period – s 13 of the TAS Act.</p>	<p>Landlords under an affected lease must not make a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings due to a failure to pay rent or outgoings or the business not being open during the hours required by the Lease, during the response period or extension period. There are limited exceptions where the Landlord may take such action, such as:</p> <ul style="list-style-type: none"> - in accordance with a variation of the lease under Div 3, a settlement agreement or court order - if, despite the Landlord's genuine attempt to negotiate the rent and terms of the Lease, the Tenant has substantially failed to comply with its obligations in relation to negotiations - on a ground that is not related to the effects of the COVID-19 emergency. <p>Regulation 12 QLD Regs.</p> <p>The parties can contract out of this prohibition – reg 10 of the QLD Regs.</p>	<p>Similar to the National Code. A difference is that to receive this protection from the Landlord seeking recourse to any security relating to the non-payment of rent, during the relevant period a Tenant under an eligible lease must comply with the process to request rent relief or it must pay rent in accordance with a variation to the Lease or other agreement – reg 9 of the Vic Regs.</p> <p>In addition, a Landlord under an eligible lease must not have, or attempt to have, recourse to any security relating to the non-payment of rent if the Tenant has reduced its opening hours or closed the premises/ceased to carry out business at the premises – reg 18(4) of the Vic Regs.</p>	<p>The prohibition applies during the emergency period.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on 'prohibited action' by the Landlord (which includes recovery of the whole or part of any security for the performance of the Tenant's obligations, as well as other actions) - applies to a breach of the Lease during the emergency period because of the Tenant's failure to pay rent or other money due under the Lease, the business is not open for the required hours, or any act or omission prescribed by regulations – s 9 of the WA Act. <p>From 30 September 2020, there are exceptions to the prohibition, such as where the Tenant is insolvent when the prohibited action is taken, and where the Tenant has not made a request for rent relief in relation to unpaid rent relating to the breach – reg 2D of the WA Regs.</p>	<p>The prohibition applies during the applicable prescribed period, where the Tenant is an affected lessee.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on 'prescribed action' by the Landlord (which includes recovery of the whole or part of a security bond as well as other actions) - applies to a breach of the Lease by the Tenant during the prescribed period because of a failure to pay rent or outgoings or the business not being open for the required hours. <p>There is a limited exception to the prohibition where the breach is non-payment of rent in breach of a mediation agreement or Court order, and this depends on the timing during period 1 or period 2.</p> <p>A Landlord may take a prescribed action against a Tenant in respect of a breach of a commercial lease that occurred:</p> <ul style="list-style-type: none"> - with a Tenant who is an affected lessee in period 1 – before 30 March 2020 - with a Tenant who is an affected lessee in period 2 but not period 1 – before 1 October 2020. <p>Regulation 7 of the SA Regs.</p>	<p>Not expressly addressed by the Notice.</p>

Leasing principles (cont.)	ACT	NSW	Tas	QLD	VIC	WA	SA	NT
<p>LP12 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 #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.</p>	Not expressly addressed.	Similar to the National Code, except that negotiating parties must only have 'regard to' the economic impacts of the COVID-19 pandemic and the leasing principles set out in the National Code – See reg 7(4) of the ROCL Regs and cl 5(4) of Sch 5 of the Conv Regs.	Some similarity with the National Code. During the financial hardship period, a Landlord in a protected lease must, at the protected lessee's request, extend the period of the Lease until the end of the financial hardship period or an agreed longer period. This extension must be on terms and conditions in accordance with the TAS Act, must not be less favourable to the Tenant (except as prescribed) and may be modified to comply with changes in the law that occurred after the protected lease was entered into. There are limited exceptions, such as: <ul style="list-style-type: none"> - where the protected lease is a sublease and the head lease has ended or will end before the end of the financial hardship period - the Landlord has granted another lease over the same premises that will take effect on the expiry of the protected lease - the Landlord intends to occupy the premises to carry on a business (other than leasing). See s 15 of the TAS Act. 	Similar to the National Code. If rent under an affected lease is waived or deferred – the Landlord must offer the Tenant an extension of the term of the Lease on the same conditions as those contained in the Lease (except for rent payable which is to be adjusted for the waiver or deferral). The extension offered to the Tenant must be equivalent to the period for which rent is waived or deferred. There are limited exceptions (where the Landlord has an inconsistent legal obligation, or the Landlord intends to use the leased premises for a commercial purpose of the Landlord). See reg 18 of the QLD Regs.	Similar to the National Code, except that it is a mandatory obligation on the Landlord under an eligible lease – s 13 of the Vic Regs.	Similar to the National Code. However, there is an exception when this requirement does not apply, being where it would be inconsistent with a head lease or any other contract/agreement entered into by the Landlord with another party relating to the same premises – cl 9 of the WA Code.	Not expressly legislated, however the parties must negotiate having regard to: <ul style="list-style-type: none"> - the economic impacts of the COVID-19 pandemic on the parties - the provisions of the SA Act and the SA Regs - the National Code. Regulation 6 of the SA Regs. If the Magistrates Court makes an order for payment of rent to be deferred under reg 9(5)(e) or (ea), then the Court may also make an order extending the term of the lease for the period that rent is deferred (as well as any other order the Court thinks necessary or desirable to resolve a dispute) – reg 9 of the SA Regs.	Not expressly addressed by the Notice.
<p>LP13 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 tenant.</p>	Not expressly addressed.	The prohibition applies during the prescribed period where the Tenant is an impacted lessee. In addition, after the prescribed period, a Landlord must not take a 'prescribed action' (such as termination of the Lease) on the grounds of breach due to a failure by an impacted lessee to pay a rent increase during the prescribed period – regs 6(2) and 6(3) of the ROCL Regs and cl 4 of Sch 5 of the Conv Regs. Whilst in the National Code this prohibition is 'notwithstanding any arrangements between the landlord and tenant,' in NSW nothing in the relevant regulation prevents the Landlord and Tenant from agreeing to the parties taking any action in relation to the commercial lease – reg 6(6) of the ROCL Regs and cl 4(6) of Sch 5 of the Conv Regs.	Slightly different to the National Code. It applies to protected leases, and the parties may agree in writing that the rent freeze does not apply. The prohibition does not apply to rent determined by a prescribed factor – s 17 of the TAS Act. There is also a Notice issued under s 22 of the <i>Covid-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (Tas)</i> which prevents rent increases (except for rent increasing because of an increase in turnover). This applies to certain commercial leases (with a business turnover of less than \$50 million where that business is also eligible for the JobKeeper program) that were in place at 1 February 2020 or which commenced prior to 9 April 2020.	Slightly different to the National Code: <ul style="list-style-type: none"> - the prohibition applies during the response period and extension period - if the Lease provides for a review of rent during the response period or extension period, the Landlord may review the rent under the Lease but must not charge the increased rent until 1 January 2021. Regulation 13 of the QLD Regs.	Similar to the National Code. However, the Landlord and Tenant under the eligible lease may agree in writing that this prohibition does not apply – reg 12(2) of the Vic Regs.	Similar to the National Code. From 30 September 2020, this prohibition does not apply where the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease when the rent is increased – s 11 of the WA Act and reg 4A of the WA Regs.	Similar to the National Code, where the Tenant is an affected lessee. However, the Landlord and Tenant may contract out of this prohibition – reg 7(4) of the SA Regs.	Not expressly addressed by the Notice.

Leasing principles (cont.)		ACT	NSW	Tas	QLD	VIC	WA	SA	NT
LP14	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.	<p>Landlords must first engage in good faith negotiations with an impacted tenant before taking a prescribed action in relation to a prescribed breach – s 9 of the ACT Declaration.</p> <p>A prescribed breach is a failure by an impacted tenant during the prescribed period to pay rent, outgoings/other amounts or to operate the business during the hours required by the Lease – s 5(1) of the ACT Declaration.</p> <p>Good faith negotiations require 'having regard' to the overarching principles and leasing principles in the National Code – s 6(1) of the ACT Declaration.</p> <p>A Landlord may take a prescribed action against an impacted tenant if the Tenant agrees to the action, or the Landlord has engaged in good faith negotiations with the Tenant and the Tenant surrenders the Lease – s 7 of the ACT Declaration.</p>	<p>The prohibition applies during the prescribed period, where the Tenant is an impacted lessee.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on 'prescribed action' by the Landlord. As well as a prohibition on the Landlord requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a Tenant, 'prescribed action' also includes 11 other prohibited actions. - also applies to 2 other breaches of the commercial lease (as well as the business not being open during the hours specified in the Lease) being a failure to pay rent or outgoings. <p>See reg 6 of the ROCL Regs and cl 4 of Sch 5 of the Conv Regs.</p>	As per the National Code, in relation to protected leases – s 14 of the TAS Act.	Landlords under an affected lease are unable to take a prescribed action (including requiring the payment of interest on, or a fee or charge relating to unpaid rent or outgoings) due to a the business not being open for hours required under the Lease during the response period or extension period. There are limited exceptions – reg 12 of the QLD Regs.	Different to the National Code. A Tenant is not in breach of any provision of the eligible lease that relates to opening hours if it reduces opening hours or closes its business during the relevant period – reg 18 of the Vic Regs.	<p>A Landlord cannot take prohibited action during the emergency period on the grounds of a breach by the Tenant if the breach consists of not being open for business at hours or times specified in the Lease (as well as other specified breaches) – s 9(b) of the WA Act.</p> <p>From 30 September 2020, there are exceptions to the prohibition, such as where the Tenant is insolvent when the prohibited action is taken, and where the Tenant has not made a request for rent relief in relation to unpaid rent relating to the breach – reg 2D of the WA Regs.</p>	<p>The prohibition applies during the applicable prescribed period, where the Tenant is an affected lessee.</p> <p>The prohibition:</p> <ul style="list-style-type: none"> - is on 'prescribed action' by the Landlord - applies to a breach of the Lease by the Tenant during the prescribed period because of a failure to pay rent or outgoings or the business not being open for the required hours. <p>There is a limited exception to the prohibition where the breach is non-payment of rent in breach of a mediation agreement or Court order, and this depends on the timing during period 1 or period 2.</p> <p>A Landlord may take a prescribed action against a Tenant in respect of a breach of a commercial lease that occurred:</p> <ul style="list-style-type: none"> - with a Tenant who is an affected lessee in period 1 – before 30 March 2020 - with a Tenant who is an affected lessee in period 2 but not period 1 – before 1 October 2020. <p>Regulation 7 of the SA Regs.</p>	Not expressly addressed by the Notice.
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.	<p>The COVID-19 Local Business Commissioner has been appointed by the ACT Government to mediate in lease negotiations between Landlords and Tenants affected by the economic impact of COVID-19. This is on a voluntary basis.</p>	<p>Disputes under the ROCL Regs (see Part 8 of the <i>Retail Leases Act 1994</i> (NSW)):</p> <ul style="list-style-type: none"> - any party to a retail shop lease may refer a dispute to the Registrar of Retail Tenancy Disputes for mediation - a retail tenancy dispute may not be the subject of court proceedings unless the Registrar has certified that mediation has failed or the court is otherwise satisfied that mediation is unlikely to resolve the dispute. This does not apply to proceedings for an injunction. <p>Disputes under the Conv Regs:</p> <ul style="list-style-type: none"> - a Landlord must not seek to recover possession of premises, terminate the Lease or exercise/enforce a right under the Lease unless the Small Business Commissioner has certified that mediation has failed and given reasons for the failure – cl 6 of Sch 5 of the Conv Regs. 	<p>The parties to a protected lease must attempt to resolve by direct negotiation a dispute that arises during the financial hardship period or that, in the financial hardship period, relates to a right or obligation under the TAS Act – s 22 of the TAS Act.</p> <p>A party to a protected lease may apply for mediation – s 23(1) of the TAS Act.</p> <p>A party to a protected lease may apply for arbitration under the <i>Commercial Arbitration Act 2011</i>, whether or not the party has applied for mediation – s 26(1) of the TAS Act.</p>	<p>Parties can follow the dispute resolution process under the QLD Regs, even if a mandatory/ optional dispute resolution process in the Lease has not been complied with – reg 22 of the QLD Regs.</p> <p>An 'eligible lease dispute' is an affected lease dispute or a small business tenancy dispute – reg 21 of the QLD Regs.</p> <p>The parties must first attempt to resolve a dispute prior to starting mediation – reg 25(1) of the QLD Regs. A party to an eligible lease dispute may give notice of the dispute to the Small Business Commissioner, and then a mediation will be arranged or the dispute notice will be dismissed – reg 26(1) of the QLD Regs.</p> <p>It is then limited when a party may apply to QCAT regarding the dispute (for example, if the parties can not reach a settlement agreement, or a party does not attend the mediation and does not have a reasonable excuse or comply with a settlement agreement). It must also be no more than 6 months since the relevant lease ended, or the last day the Tenant was required to pay deferred rent – reg 41 of the QLD Regs.</p>	<p>A Landlord or Tenant under an eligible lease may refer a dispute arising in relation to a matter arising under the Vic Regs to the Small Business Commission for mediation – reg 20 of the Vic Regs.</p> <p>An eligible lease dispute may only be heard in the Victorian Civil and Administrative Tribunal or a court (other than the Supreme Court) if the Small Business Commission has certified in writing that mediation has failed or is unlikely to resolve the dispute. There are additional requirements for an eligible lease dispute to be the subject of Supreme Court proceedings. However, these restrictions do not apply to a proceeding for an injunction – reg 23 of the Vic Regs.</p>	<p>For certain disputes, a party to the dispute may request the Small Business Commissioner to provide assistance to resolve the dispute or to undertake alternative dispute resolution in respect of the dispute – s 18 of the WA Act.</p> <p>A party to a dispute may apply to the State Administrative Tribunal to have the dispute determined. However, such an application cannot be made unless:</p> <ul style="list-style-type: none"> - none of the parties to the dispute has made a request to the Small Business Commissioner in respect of the dispute and the parties agree that the application to the Tribunal can be made - the Small Business Commissioner has issued a certificate that it is satisfied that the dispute is unlikely to be resolved with the assistance of alternative dispute resolution, it would not be reasonable in the circumstances to commence alternative dispute resolution proceedings, or alternative dispute resolution has failed to resolve the dispute – ss 16 and 19 of the WA Act. 	<p>A party including the Tenant, where it is an affected lessee may apply to the Small Business Commissioner for mediation of a relevant dispute – reg 8 of the SA Regs.</p> <p>A party may only apply to the Magistrates Court for resolution of a relevant dispute if the Small Business Commissioner has issued a certificate stating that mediation has terminated without resolution, mediation would not be reasonable in the circumstances, or if a party refused to or did not participate in good faith – reg 9(2) of the SA Regs.</p> <p>There are differences in the mediation provisions depending on period 1 or period 2 – reg 8(2a) of the SA Regs.</p>	<p>Before hearing and determining an application for a warrant of possession of business premises, the Local Court must refer the matter to the Northern Territory Civil and Administrative Tribunal (NTCAT) for alternative dispute resolution (unless there are exceptional circumstances) – s 132B of the BT(FD) Act.</p> <p>The Local Court may adjourn the hearing of an application to allow mediation or conciliation to occur if satisfied that the parties prefer to arrange their own mediation or conciliation, and that such a course is appropriate without involving NTCAT – s 132C of the BT(FD) Act.</p>

Leasing principles (cont.)		ACT	NSW	Tas	QLD	VIC	WA	SA	NT
Binding Mediation	Landlords and tenants must not use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.	Not expressly addressed.	Not expressly legislated.	No express provision.	In attempting to resolve a dispute, each party must cooperate and act reasonably and in good faith in all discussions and actions associated with the dispute – reg 25(2) of the QLD Regs. The Small Business Commissioner may dismiss the dispute notice if the commissioner considers the notice does not relate to an eligible lease dispute, is frivolous or vexatious, or has not been given in good faith – reg 26(4) of the QLD Regs.	As per the National Code.	Not expressly legislated.	Not expressly legislated in the SA Regs.	Not expressly addressed by the Notice. However, there may be a costs penalty in the Local Court. For example, although the recovery of legal costs is limited where a warrant for possession is made during the emergency period, the Local Court may make a costs order against a party if the party failed in whole or in part to genuinely attempt to enable and assist the Court to make a decision on its merits – s 4 of the Notice.

This material was updated on 6 November 2020. Any legislation, policies or documentation referred to may have changed since that date. This material is provided to AGS clients for general information only and should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of this fact sheet.