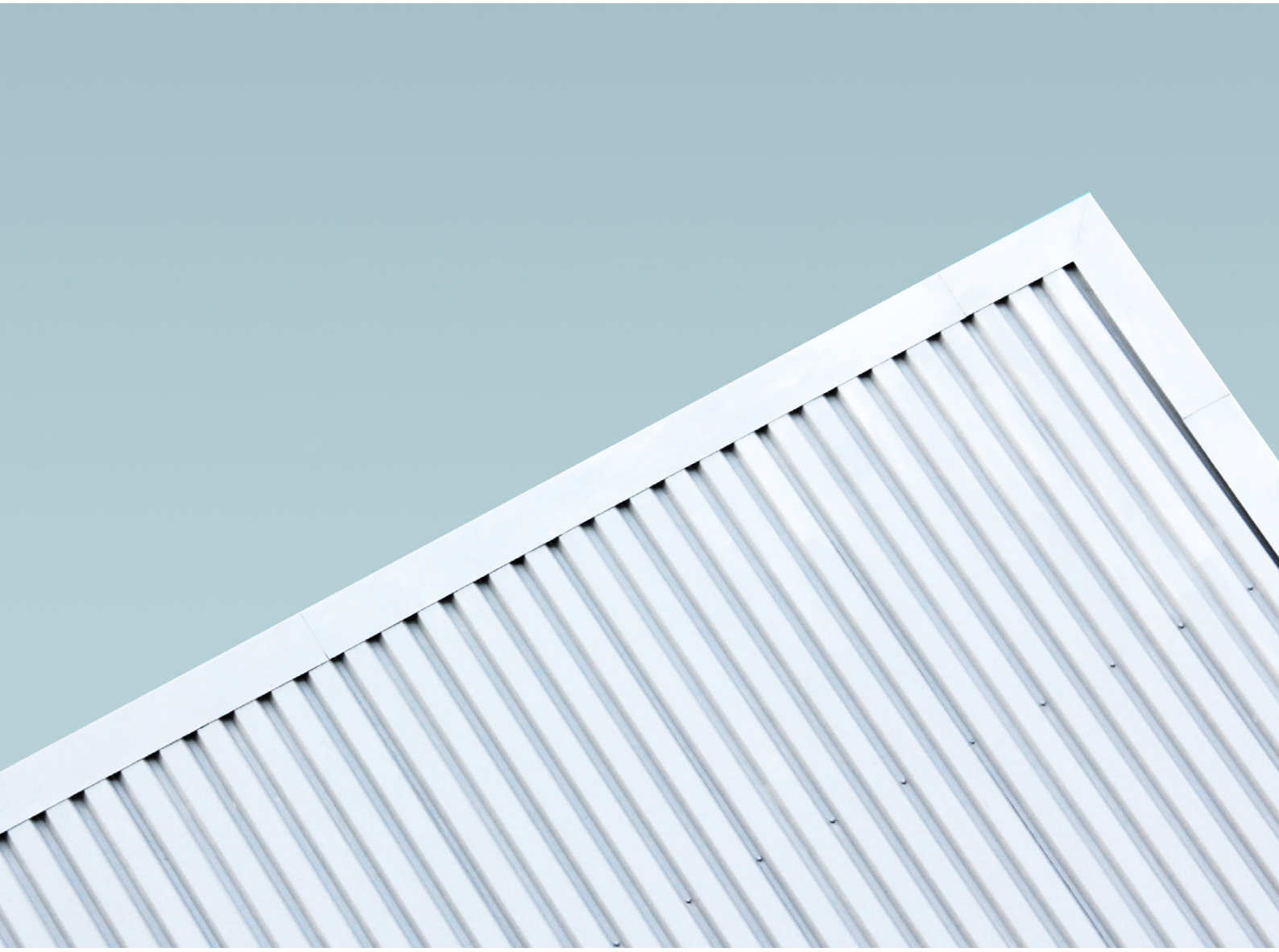

COVID-19: navigating the national Code of Conduct for commercial tenancies

15 June 2020

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Introduction

The COVID-19 pandemic has caused significant disruption to Australia's economy (and economies worldwide). Business restrictions and other temporary regulatory changes put in place to contain the pandemic and the related economic downturn has resulted in significant financial hardship for landlords and tenants under commercial, industrial and retail lease arrangements.

The National Cabinet Mandatory Code of Conduct for commercial tenancies was released by the National Cabinet on 7 April 2020 (**Code**). The Code was prepared with the purpose of imposing a set of 'good faith leasing principles' that will apply to parties to commercial, industrial and retail leases that are impacted by circumstances related to the COVID-19 pandemic.

The Hon Scott Morrison MP, Prime Minister of Australia, clarified that the Code will be mandatory for tenancies where the tenant (**SME tenant**):

- is a small-to-medium sized business, with an annual turnover of up to $50 million; and
- is in a position of financial stress or hardship as a result of the COVID-19 pandemic, defined by reference to the tenant's eligibility for the Commonwealth Government's JobKeeper Scheme.

Ultimately, the federal government expects that 'the spirit' of the Code should apply to all leasing arrangements for affected businesses, with regard to the size and structure of those businesses.

The Code outlines 11 Overarching Principles to guide the conduct of negotiation and the implementation of these arrangements. These overarching principles aim to ensure arrangements are appropriately tailored to the relevant lease, are negotiated in good faith and follow the objectives of the Code.

In addition, the Code outlines 14 Leasing Principles to be applied on a case-by-case basis to each temporary arrangement.

The Code is not legislation and does not have the force of law. As a result, State and Territory governments have legislated to bring the Code into force (from a date following 3 April 2020). As at the date of this publication, all Australian States and Territories have introduced instruments bringing the Code into force. A summary of the implementing legislative approaches to the Code across New South Wales, Victoria, Queensland and Western Australia are contained in Annexure 2.

The following document is an in depth analysis of key changes that the Code, and the implementing legislative approaches in New South Wales, Victoria, Queensland and Western Australia, is introducing and addresses many of the key questions that we have considered since the Code and implementing legislation was announced and released.

The content of this document is for reference purposes only. It is current at the date of distribution. This content does not constitute legal advice and should not be relied upon as such. Legal advice about your specific circumstances should always be obtained before taking any action based on this publication.

Application of the Code

To be read in conjunction with the National Cabinet Mandatory Code of Conduct published 7 April 2020.

The Code applies to commercial tenancies (including retail, office and industrial) during the operation of the JobKeeper Program.

Does the tenant have an annual turnover of $50M or less (at the group or franchisee level) and qualify for the JobKeeper Program?

NO → **CODE DOES NOT APPLY**

YES ↓

CODE APPLIES

1. Landlord to send questionnaire to tenant requesting information relating to:
   (a) the financial impact of COVID-19 on the business; and
   (b) FIRB approval requirements.
2. Landlord to assess information provided by tenant.

Tenant and landlord to negotiate tailored and appropriate temporary amendments to existing leasing arrangements based on the following overarching and leasing principles.

Principles

Overarching principles

Tenants and landlords must:

- act in good faith;
- act in an open, honest and transparent manner; and
- provide each other with sufficient and accurate information, including information from financial institutions or generated by an accounting system.

Leasing principles

Key principles include but not limited to:

- moratorium on termination of lease;
- tenants remaining committed to their lease;
- proportionate reductions in rent and outgoings by way of waivers and deferrals;
- landlords cannot draw on securities; and
- freeze on rent increases.

Tenant and landlord agree on appropriate arrangement

Tenant and landlord fail to agree on appropriate arrangement → **Binding mediation** by the applicable State or Territory retail/ commercial leasing dispute resolution processes

Threshold questions

1 What is a 'lease' for the purposes of the Code and the implementing legislation?

The Code applies to 'commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants'. A copy of the Code is **attached** at Annexure 1.

While the Code has not expressly defined a 'lease' for its purposes, as the Code aims to provide relief to parties who have been impacted by COVID-19, the relevant instruments released by the States giving effect to the Code have generally given 'leases' a broad meaning.

Although the Code is not intended to supersede State and Territory legislation (and is explicitly supplemental to that legislation and indeed the general law), in New South Wales, Victoria and Queensland, this has been done through amendments to existing tenancies legislation while in Western Australia, standalone legislation has been introduced. State implementing legislative approaches to the Code have relied on the definition of 'leases' as defined in these respective tenancy instruments. Please see Annexures 3 and 4, where we have included an analysis of the interaction between the Code and relevant State-based legislation.

Further, whilst the Code refers to 'leases', a licence document (e.g. a car park licence) may be referenced in or given force under the terms of a lease. Analysis of the relevant documents will need to be undertaken in each case. Various documents are given the title of a 'licence', but may in fact be leases notwithstanding their nomenclature (e.g. because they grant exclusive possession). The Code's application extends to tenancies between 'owners/operators/other landlords' and 'tenants'. In specifying 'operators' as party to the Code, it appears that the Code intends to capture a commercial party who may not strictly be an owner or landlord of a premises but is in a position of entering leasing arrangements with a tenant often as agent of the landlord/owner.

Certain retail instruments expand the common law definition of a lease to include rights of occupancy as leases.

1.1 New South Wales implementing legislation

New South Wales enacted the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) (**NSW Regulations**) to give effect to the Code.

The NSW Regulations include:

1. regulations made under the *Retail Leases Act 1994* (NSW) (**NSW Retail Regulation**); and
2. regulations made under the *Conveyancing Act 1919* (NSW), which are now inserted as a new Schedule 5 of the *Conveyancing (General) Regulation 2018* (NSW) (**NSW Conveyancing Regulation**).

The NSW Regulations apply to 'commercial leases' which are defined under the NSW Regulations to include:

1. under the NSW Retail Regulation, retail shop leases under the *Retail Leases Act 1994* (NSW) (**Retail Leases Act NSW**); and
2. under the NSW Conveyancing Regulation, any agreement to which the *Conveyancing Act 1919* (NSW) (**Conveyancing Act NSW**) applies relating to the leasing of premises or land for commercial purposes,

in each case excluding a commercial lease if it is entered into after 24 April 2020 (it being acknowledged however that the NSW Regulations will apply to a commercial lease entered into after 24 April 2020 if it is entered into to exercise an option to extend or renew an existing lease).

Leases regulated under the NSW Retail Regulation are excluded from the operation of the NSW Conveyancing Regulation and vice versa. The NSW Regulations also exclude leases under the *Agricultural Tenancies Act 1990* (NSW).

Sub-leases will be leases regulated by the NSW Regulations (including in situations where the head lease is not regulated by the NSW Regulations).

The definition of 'commercial leases' is broad and as a result some licences (notwithstanding their nomenclature) may be regulated leases under the NSW Regulations - either because they are in fact a lease upon analysis or are deemed to be a retail shop lease under the Retail Leases Act NSW. Careful analysis on a case by case basis of the relevant licence is needed.

In our view, an agreement for lease can, in certain circumstances, be considered a lease which would be regulated under the NSW Regulations. It is common for an agreement for lease to include licence provisions (which

may cause the agreement to be treated as a lease regulated by the NSW regulations – see comments above) or to state that the agreed form of lease will apply as from the occurrence of a trigger event (for example, on the date of practical completion). If this is the case, an agreement for lease as from the date of the occurrence of the trigger event can be considered a lease regulated under the NSW Regulations. Whilst this should be considered on a case by case basis, in the event an agreement for lease is regulated by the NSW Regulations, in certain instances the provisions of the NSW Regulations will have limited impact on the document given no rent or outgoings are payable and there may not be any requirement for the tenant to ensure the business is open during certain hours.

1.2 Queensland implementing legislation

The *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (Qld) (**Qld Regulation**) made under section 23 of the *COVID-19 Emergency Response Act 2020* (Qld) and section 121 of the *Retail Shop Leases Act 1994* (Qld) gives effect to the Code in Queensland.

The Qld Regulation commenced on 28 May 2020 and applies to 'affected leases'. A lease will be an 'affected lease' if:

1. it is:
   (a) a retail shop lease; or
   (b) a lease under which the leased premises are to be wholly or predominantly used for carrying on a business.
2. as at 28 May 2020, the lease, or an agreement to enter into the lease, is binding on the tenant (whether or not the lease has commenced).
3. the tenant is an SME entity (as defined in the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020*).
4. the tenant, or an entity connected with, or an affiliate of, the tenant responsible for, or involved in, employing staff for the business carried on at the premises, is eligible for the JobKeeper Scheme.

However, the following are not 'affected leases':

1. a lease where the premises are to be used wholly or predominantly for a farming business under the *Farm Business Debt Mediation Act 2017* (Qld).
2. a lease, permit, licence or sublease under the *Land Act 1994* (Qld), unless:
   (a) it is a sublease of a premises under a lease that has a rental category of 13 or 16 under that Act; and
   (b) the sublessor is not a government leasing entity within the meaning of section 30(3) of the *Land Regulation 2009* (Qld).

The definition of an 'affected lease' is broad and applies to more than just commonly understood leases granting exclusive possession. The definition relies on the broad definition of 'retail shop lease' from the *Retail Shop Leases Act 1994* (Qld) and of 'lease' from the *COVID-19 Emergency Response Act 2020* (Qld). As a result, the Qld Regulation will apply, for example, to leases, subleases, licences and agreements for lease for office, retail and industrial premises where the tenant is an SME Entity and is eligible for the JobKeeper Scheme.

The Qld Regulation also expressly applies to common head lease arrangements entered into for franchising purposes. In particular, in circumstances where a franchisor enters into a lease of premises and subsequently subleases or licences the premises to a franchisee, if the sublease or licence to the franchisee qualifies as an affected lease, the franchisor's lease will also be an affected lease for the purposes of the Qld Regulation. This will be the case despite the franchisor not being an SME Entity or not being eligible for the JobKeeper Scheme.

1.3 Victoria implementing legislation

Victoria enacted the *COVID-19 Omnibus (Emergency Measures) Act 2020* (**Vic Act**) on 24 April 2020 and the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (**Vic Regulations**) on 1 May 2020, which together, give effect to the Code.

The Vic Regulations apply to 'eligible leases'. Subject to the carve outs noted below, an eligible lease is:

1. a retail lease as defined in the *Retail Leases Act 2003* (Vic); or
2. a non-retail commercial lease or licence, being:
   (a) a non-retail lease of premises under which the premises are let for the sole or predominant purpose of carrying on a business at the premises; or
   (b) a commercial licence, sub-licence or agreement for a licence or sub-licence, under which a person has the right to non-exclusively occupy a part of the premises for the sole or predominant purpose of carrying on a business at the occupied premises (the licence need not be in writing or partly in writing and may be express or implied);
3. which is in effect on 29 March 2020; and
4. the tenant under which is, on or after 29 March 2020:
   (a) an SME entity, being an entity with an anticipated turnover for the current financial of less than $50 million, or an actual turnover for the previous financial year of less than $50 million; and
   (b) an employee who qualifies for and participates in the JobKeeper Scheme.

A lease or licence of premises which may be used wholly or predominantly for a specified list of farming and agricultural purposes will **not** be an 'eligible lease'.

For more details on eligibility under the Vic Act and Vic Regulations, please see Section 14.2.

1.4 Western Australia implementing legislation

Western Australia enacted the *Commercial Tenancies (COVID-19 Response) Act 2020* (WA) (**WA Act**) on 24 April 2020 and the *Commercial Tenancies (COVID-19 Response) Regulations 2020* (**WA Regulations**) on 30 May 2019. The WA Act provides clarity around what constitutes a lease for the purposes of the legislation and the WA Regulations contain a Western Australian Code of Conduct (**WA Code**) applicable to the negotiation of rent relief arrangements, amongst other things.

The WA Act introduces the concept of a 'small commercial lease' which is defined to include:

1. any retail shop lease as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) (**WA Retail Shops Act**);
2. any lease, sub-lease, licence or other agreement under which a person grants a right to another person to occupy land or premises whether orally or in writing where the tenant:
   (a) is an incorporated associate; or
   (b) owns or operates a small business and uses the land or premises that are the subject of the lease for the carrying on of that business; or
3. any lease of a class prescribed by regulations.

A 'small business' is defined in the *Small Business Development Corporation Act 1983* (WA) (**Small Business Act WA**) to be a business undertaking which is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the *Corporations Act 2001* of the Commonwealth and which:

(a) has a relatively small share of the market in which it competes; and
(b) is managed personally by the owner or owners or directors, as the case requires; and
(c) is not a subsidiary of, or does not form part of, a larger business or enterprise;

Given this definition, Australian and foreign listed corporations and subsidiaries of those listed corporations (e.g. Coles and Woolworths) are excluded from the operation of the WA Act as they are not small business or retail shops for the purpose of the WA Retail Shops Act.

The WA Code applies to landlords and tenants of a 'relevant small commercial lease' and small commercial leases that are a 'relevant small commercial lease'.

A lease is a 'relevant small commercial lease' if it is a small commercial lease as defined in the WA Act and the tenant is an 'eligible tenant' being a tenant:

1. whose turnover in the financial year ending 30 June 2019 was less than $50 million:
   (a) if the tenant is a franchisee, for the business conducted by the tenant at the land or the premises that are the subject of the small commercial lease;
   (b) if the tenant is a corporation that is a member of a group, for the group;
   (c) in any other case, for the business conducted by the tenant at the land or premises that are the subject of the small commercial lease; and
2. the tenant:
   (a) qualifies for the JobKeeper Scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Commonwealth) section 7; or
   (b) has at any time during the emergency period satisfied the decline in GST turnover tests set out in section 8 of those Rules.

A summary of what leases the Code and the implementing legislation and regulations in each State apply to is set out under 'What leases are included?' in the table at Annexure 2.

2 What is the relationship between the Code and the JobKeeper Scheme?

2.1 Tests

The Code applies to all tenancies:

1. 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 Scheme (**Test 1**); and
2. which have an annual turnover of up to A$50 million (**Test 2**).

In essence this is a dual test and there is overlap between Test 1 and Test 2.

Test 1 is addressed in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) (**JobKeeper Rules**).

The States and Territories have passed legislation implementing the principles set out under the Code. Sections 13 to 16 of this publication set out the implementing legislative approach of each State.

> We include at Annexure 6 an overview of the eligibility thresholds and relevant turnover tests under the JobKeeper Scheme and the Code in Queensland, New South Wales, Victoria and Western Australia.

An employer (including not-for-profits and self-employed individuals) will be eligible for the JobKeeper Scheme if:

1. the entity has an aggregated annual turnover of A$1 billion or more – the entity estimates its projected GST turnover has or will likely fall by 50% or more;
2. the entity is a charity registered with the Australian Charities and Not-for-profits Commission (**ACNC**), excluding non-government schools and universities – the entity estimates its projected GST turnover has or will likely fall by 15% or more; and
3. in all other cases, the entity estimates its projected GST turnover has or will likely fall by 30% or more.

Test 1 – JobKeeper Scheme

The annual turnover of the group is defined by reference to the *Income Tax Assessment Act 1997* (Cth) (**Aggregation Rules**) but the decline in turnover test under the JobKeeper Scheme is determined by assessing the decline in turnover of the tenant (based on the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**)).

In short, the annual turnover test would apply to foreign entities which are connected to the entity, whilst the decline in turnover test only applies to the tenant (i.e. does not include foreign entities).

Annual turnover

The annual turnover test applies the aggregation rules in Division 328 of the Aggregation Rules.

The Aggregation Rules provide that the aggregated turnover of an entity includes:

- the entity's own annual turnover; and
- the annual turnover of any connected or affiliated entity (which includes overseas entities).

Essentially, an entity is connected if the first entity, its affiliates, or the first entity together with its affiliates:

- owns or have the right to acquire the ownership of interests that carry between them the right to receive a percentage that is at least 40% of any distribution of income, capital or net income by the other entity; or
- owns or have the right to acquire the ownership of, equity interests in the company that carry between them the right to exercise, or control the exercise of, a percentage (the control percentage) that is at least 40% of the voting power in the company.

The ability of a landlord to verify the position of a tenant within a broader group (and consequently the aggregated annual turnover of the tenant) without a complete structure diagram of the 'group' and viewing the underlying documents in relation to certain information (for example, distributions or voting power) will be limited. Landlords would need to rely on the assessment by the ATO as to eligibility (receipt of the golden ticket).

Decline in turnover

The basic test for the decline in turnover is undertaken at the entity level and only applies to the employing entity.

Importantly, the JobKeeper Rules modify the normal meaning of turnover and disregard group turnover so that subsections 188 15(2) and 188 20(2) of the GST Act (about members of GST groups) are to be disregarded when calculating the decline in turnover for the purpose of the JobKeeper Scheme.

Test 2 – $50 million annual threshold

The assessment of a tenant's annual turnover for the purpose of the Code (both in terms of the method of calculating turnover and which entities are included in assessing turnover) is addressed slightly differently across each State under their respective legislative approach.

Under the Code, the 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). Whilst the concept of a group is not defined under corporations law, the question of what consists of a group is dealt with under the implementing legislative approaches of each State.

We set out below an analysis of what we know about the Code and the JobKeeper Scheme and how they will operate in tandem.

2.2 How are corporate groups treated under the Code and the implementing legislation?

Neither the JobKeeper Rules nor the Code adequately deal with complex corporate or organisational structures – particularly structures under which an employing entity does not itself generate sales or where the tenant entity is not the employing entity.

The NSW Regulations remove the reference to 'retail', so that if the tenant entity is part of any corporate group, the turnover of that group is assessed. The Vic Act also excludes the reference to 'retail' but also expands the turnover assessment to entities connected with the tenant and entities that have a prescribed control or influence in decisions or actions of the tenant. Similar to New South Wales and Victoria, the WA Regulations also remove the reference to 'retail' however define a 'corporate group' as corporations that are related bodies corporate within the meaning of the Corporations Act. The Qld Regulation provides that if the tenant is an entity connected with, or an affiliate of, another entity, the aggregate annual turnover of those entities is to be used for assessing the tenant's annual turnover. The terms 'connected with' and 'affiliate' are defined under the Aggregation Rules and will generally cover all relevant corporate groups.

One concern with the drafting of the Code and its close connection to the JobKeeper Scheme is that it does not adequately address group structures where the tenant entity (which would be the entity seeking the protection afforded by the Code) is not the employer entity (being the entity which would qualify for the JobKeeper Scheme). Unless the tenant entity has qualified for the JobKeeper Scheme, it is not afforded the protections of the Code. This issue is also reflected in the Vic Act which defines 'eligible lease' by reference to a tenant which is both an SME entity and an employer who qualifies for and participates in the JobKeeper Scheme.

The Qld Regulation seeks to address this issue by providing that a lease will be an 'affected lease' if it is entered into with an SME Entity and the tenant entity, *or an entity that is connected or affiliated with the tenant entity who is responsible for employing staff*, is eligible for the JobKeeper Scheme.

Whilst on a strict reading the Code may only apply to a limited range of tenants, the Code does encourage its application to tenants that do not strictly fall under the Code but are affected by the pandemic: "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". The spirit of the Code applying to all leasing arrangements for affected businesses is not generally picked up under implementing State legislative regimes – the implementing regimes generally only focus on leasing arrangements entered into with SME Entities.

2.3 Entity approach under the JobKeeper Scheme

On its face, availability of the JobKeeper Scheme is restricted to an entity that employs an individual and itself suffers a decline in turnover.

The JobKeeper Rules do not adequately address organisational structures where an employing entity does not itself generate sales or supply services for GST purposes or where complex sales structures are utilised.

The approach may also not accommodate COVID-19 impacts on entities that operate through divisions – where for example an entity (say a company) operates different businesses within a divisional structure, some of which suffer a decline in projected GST turnover while others do not.

The approach reflected in the JobKeeper Rules suggests that, for a corporate group with many operating subsidiaries, eligibility must be assessed for each individual entity.

The approach of assessing individual turnover impacts on entities within a group structure arguably does not respond to the fact that many groups are, both from an economic and liability perspective, an integrated whole. An example of which would be groups which are subject to an ASIC Deed of Cross Guarantee in which there is joint and several liability across the group in particular circumstances.

Whilst the JobKeeper Rules grant the ATO Commissioner discretion to determine an alternative decline in turnover test this is in the context of entities for which there is not an appropriate relevant comparison period for the purpose of assessing a decline in turnover. The discretion does not extend to complex corporate groups. Ideally the ability to determine an alternative test would be broader than currently expressed.

The Code will be monitored by a Code Administration Committee to be set up by each State and Territory government.

3 What does the Code and the State based implementing legislation say regarding the significance of retrospectivity?

The Code was prepared with the intention that it come into effect in all States and Territories from a date following 3 April 2020 (being the date that the National Cabinet agreed to a set of principles to guide the Code). The actual date that the principles of the Code were implemented in New South Wales, Queensland, Victoria and Western Australia is set out below.

3.1 New South Wales

The NSW Regulations commenced on 24 April 2020 and operate for a 'prescribed period' of six months.

3.2 Queensland

The Qld Regulation commenced on 28 May 2020 and will expire on 31 December 2020. However, the Qld Regulation will regulate compliance with obligations and enforcement of rights under affected leases during the 'response period' (being the period from 29 March 2020 to 30 September 2020).

3.3 Victoria

The Vic Regulations commenced on 1 May 2020 but operate retrospectively from and including 29 March 2020. The Vic Regulations operate until, and including 29 September 2020 (**Relevant Period**).

3.4 Western Australia

Prohibited actions taken by landlords to impacted tenants as set out in the WA Act apply retrospectively and will be deemed to have come into operation on 30 March 2020.

The prohibitions will continue to apply during the emergency period, commencing on 30 March 2020 and expiring on 29 September 2020 or a day prescribed by regulation.

Any prohibited action committed during the emergency period but before the WA Act was passed remains a valid and effective action but is stayed/suspended during the emergency period, so far as the prohibited action remains incomplete or ongoing. For example, if a rent review occurred on 7 April 2020 (being during the prohibited period but before the WA Act was passed) the rent review would be valid but the higher rent would not be payable until the expiry of the emergency period.

Additionally, if prior to the WA Code being adopted, a landlord and an eligible tenant entered into an agreement to provide the tenant rent relief during the emergency period and that rent relief is less favourable than what might be provided in accordance with the principles set out in the WA Code, then the tenant may make a request for rent relief in accordance with the process set out in the WA Code.

Negotiations, mediation and the overarching principles

4 What is the meaning and significance of 'good faith' negotiations in the Code and implementing legislation?

The objective of the Code is to share, in a measured and proportionate manner, the financial risk and cash flow impacts during COVID-19 whilst seeking to balance the interest of tenants and landlords. It is the intention under the Code that a landlord will agree bespoke and temporary arrangements with each SME tenant.

It is an overarching principle of the Code that when negotiating such arrangements the landlord and tenant must negotiate in good faith. This requirement is in addition to the requirement for landlords and tenants to act in an 'open, honest and transparent manner'. The use of good faith in this context therefore suggests that good faith is more than just an obligation to be honest and transparent. Presumably some content must be given to good faith over and above these otherwise stated criteria.

4.1 Obligation of good faith

The obligation to negotiate in good faith is a mutual obligation under the Code and applies equally to landlord and tenant. The term 'good faith' is not defined under the Code and has been the subject of much debate in the courts.

In recent decisions the courts and academic commentators have held or opined that a duty of good faith encompasses the following obligations, all of which go to the nature of the negotiation process under the Code:

- to act honestly and with fidelity to the bargain;
- not to undermine the bargain or the substance of the contractual benefit bargained for;
- to act reasonably and with fair dealing having regard to the interests of the parties (which will, commonly at times be in conflict) and to the provisions and objectives of the contract (objectively ascertained);
- not acting arbitrarily or capriciously;
- to be consistent in approach;
- to communicated decisions;
- to cooperate; and
- to take into consideration the interest of the other party.

Importantly, the duty does not limit the parties seeking to strike the best possible bargain in their own interest. Rather, the concept of 'good faith' as described above requires an honest and genuine attempt to resolve differences by discussion and, if thought to be reasonable and appropriate, by compromise.

Clearly the content of good faith drives the nature of negotiations and negotiation tactics. Extreme ambit claims made at the outset of negotiations having no other purpose than to put pressure on the other party (e.g. a simple declaration by a tenant that it will no longer pay rent) seemingly does not have a place in a good faith context.

> The implementing legislative approaches in Queensland, New South Wales, Victoria and Western Australia all include provisions obliging landlords and tenants to act or negotiate in good faith.
>
> For example, under the Qld Regulation and the Vic Regulations, landlords and tenants must cooperate, act reasonably, and in good faith, in all discussions and actions associated with matters the subject of the relevant regulations. Similarly, under the NSW Regulations, a party to a commercial lease must, if requested, renegotiate in good faith the rent and other terms of the commercial lease having regard to economic impacts of the COVID-19 pandemic and the leasing principles in the Code. Under the WA Code, in all negotiations for the purpose of the WA Code the landlord and tenant must cooperate, act reasonably, in good faith and in an open, honest and transparent manner.

4.2 Compliance

Whether a party has complied with an obligation to negotiate in good faith is informed by the contractual, commercial and factual context. As the Code acknowledges, it is difficult to comment on a collective industry position, as all tenants will have different circumstances with different commercial arrangements in place. Also, the implementing legislative approaches in each State incorporate the good

faith obligation in slightly different ways. However, subject to consideration of the nuances of each State's specific regimes, behaviour that is likely to not constitute good faith negotiations may include a party:

- refusing to act transparently (including by providing reasonably requested financial information about the impact of the COVID-19 pandemic – in addition to breaching good faith, in Queensland, Western Australia and Victoria, the obligation to provide accurate information sufficient to enable negotiations in a fair and transparent way or to evidence a tenant's position as an SME Entity or eligibility for the JobKeeper Scheme is expressly incorporated in the legislation or regulations;
- refusing to compromise for the purpose of driving the other party into an expensive dispute it believes that party cannot afford;
- threatening a future breach of the contract to sway the other; and
- taking a position that it does not honestly believe to be valid or have substance.

It can be anticipated that a party to the negotiations will assert that the other side has forfeited rights under the Code by not acting in good faith. Such an allegation, given the broad content of good faith, will, as an evidentiary matter be difficult to establish.

Further, the Code and the relevant implementing legislative approach in each State are a form of consumer legislation and in all likelihood will be construed liberally in favour of those it is meant to protect, i.e. tenants. The Code is supplemental to existing statute and general law and a tenant may very well have available to it rights under those statutes and that general law in the nature of relief (e.g. relief against forfeiture).

4.3 What if the parties cannot agree?

Where a landlord and tenant cannot reach agreement on leasing arrangements the Code contemplates binding mediation. The Code expressly prohibits parties using the mediation process to prolong or frustrate the facilitation of amicable resolution outcomes.

The principles relating to dispute resolution and mediation in the Code have been implemented in each State in slightly different ways. However, all States include provisions providing for disputes to be resolved by mediation or similar (e.g. in New South Wales, Victoria and Queensland disputes must be referred to a Small Business Commissioner for mediation and in WA a party to the dispute may request a Small Business Commissioner to provide assistance to resolve the dispute or undertake alternative dispute resolution such as mediation).

5 What is the importance of the mediation provisions? Is mediation merely mediation or is it determinative?

The Code states that any disputes between landlords and tenants that arise as a direct result of COVID-19 must be referred and subjected to applicable State or Territory retail, commercial or industrial leasing dispute resolution processes for binding mediation. Many States have made provisions for dispute resolution processes, including new mediation functions and pre-existing mediation functions under existing regimes in relevant retail/commercial leasing instruments.

Current State and Territory statutory and regulatory regimes do not provide for binding mediation or conciliation in relation to retail/commercial leasing disputes. However, in New South Wales, Victoria, Tasmania, the Northern Territory and Western Australia,[1] mediation/conciliation is a compulsory step before a tribunal or court can hear the dispute.[2] Whilst participation in a mediation may be compulsory in those jurisdictions, the mediation operates in a conventional way. That is, the mediation will only resolve the dispute, and bind the parties, if they voluntarily reach consensus between themselves and enter into a binding agreement to resolve their dispute.[3]

In all jurisdictions but the Northern Territory, the mediator's/conciliator's function is merely to assist parties in reaching an agreement. Aside from under the Northern Territory regime, the mediator does not have the power to compel agreement or make orders disposing of the dispute. If parties fail to reach an agreement at mediation, then they may litigate the dispute before a relevantly empowered administrative tribunal or a court.

1 Pursuant to the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 25D, a party may not apply to the State Administrative Tribunal to determine an issue unless the Small Business Commissioner has issued a certificate under s 25C stating that ADR is unlikely to resolve the dispute, unreasonable in the circumstances or has failed to resolve the matter. However, per s 27, a party may bring the dispute before the Court at any time, although the Court may transfer it to the tribunal. Section 25D imposes a bar on an application without a certificate, it does not make the awarding of a certificate a precondition to jurisdiction. Accordingly, if a matter is referred by the Court to the Tribunal without a certificate being obtained, it appears the Tribunal may determine the dispute without the certificate. Although the Tribunal may refer the parties to compulsory, non-binding mediation at any stage in the proceedings. See *State Administrative Tribunal Act 2004* (WA) s 54(1).

2 Some schemes require mediation as a precondition to determination by a relevantly empowered tribunal or court. It is also noted that there are often carve-outs for injunctions.

3 Business Tenancies (Fair Dealings) Act pt 11 div 4.

Under the Northern Territory regime, where the parties do not settle their dispute at a conciliation conference, and the dispute relates to a monetary value of no more than $10,000, the Commissioner of Business Tenancies or their delegate may conduct an inquiry into the issue and make binding orders resolving the dispute.

Therefore, if the object of the Code is to make mediation compulsory and empower a mediator to make a binding determination to resolve the dispute, substantial modification of the existing statutory and regulatory regimes, including the Northern Territory, will be required.

However, if as we think is more likely the case, the object of the Code is to require landlords and tenants to attempt to resolve COVID-19 disputes at mediation (as a compulsory gateway to going to court), far less legislative surgery is necessary to implement the Code. In that sense, the Code's reference to 'binding mediation' should be understood as a reference to 'compulsory mediation'.

Where States have nominated pre-existing mediation provisions in relevant detailed instruments enacting the Code, the key mediation provisions of the relevant legislation are summarised in Annexure 5.[4]

The implementing legislative approaches by the States regarding mediation processes are as follows:

5.1 New South Wales

The existing dispute resolution regime for retail tenancy disputes under the Retail Leases Act NSW extends to the resolution of 'impacted commercial lease disputes' under the NSW Retail Regulation (see Annexure 5).

The NSW Retail Regulation provides that an 'impacted commercial lease dispute' means a dispute concerning the liabilities and obligations under a commercial lease where:

- an impacted tenant is a party to the lease; and
- the liabilities or obligations arose under the lease concerning circumstances arising during the prescribed period.

This definition includes disputes surrounding a renegotiation (or a failure to take part in a renegotiation) of rent payable under the lease under clause 7 of the NSW Retail Regulation.

Impacted commercial lease disputes will only be subject to the Retail Leases Act NSW mediation provisions if the dispute arises as a result of circumstances occurring during the prescribed period. Disputes in relation to liabilities and obligations arising prior to the prescribed period (before 24 April 2020) would not be covered.

Ordinarily, for leases under the Conveyancing Act NSW (other than retail leases) there is no formal mediation mechanism in place. However, clause 6 of the NSW Conveyancing Regulation provides that for relevant impacted commercial leases under the Conveyancing Act NSW, unless the NSW Small Business Commissioner has certified in writing that mediation offered by the NSW Small Business Commissioner has failed to resolve the dispute, a landlord cannot:

- seek to recover possession of premises or land under the commercial lease;
- terminate the commercial lease; or
- exercise or enforce any other right of the landlord under the commercial lease.

Unlike the dispute resolution related provisions under the NSW Retail Regulation, the NSW Conveyancing Regulation does not limit mediation before the NSW Small Business Commissioner to circumstances arising during the prescribed period or to leases which have an impacted tenant as a party. On the face of the NSW Conveyancing Regulation, the provision appears to apply to any dispute relating to a breach arising at any time and in relation to any commercial lease.

We note, however, that despite this omission, clause 3 limits the operation of the NSW Conveyancing Regulation to the exercise or enforcement of rights under a commercial lease in relation to circumstances occurring during the prescribed period. Also, clause 8 of the NSW Conveyancing Regulation provides that nothing in the regulation prevents a landlord taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic. Whilst the operation of the mediation provision is not entirely clear, read together with clauses 3 and 8 the provision may be interpreted as only operating in relation to disputes relevant to impacted tenants arising out of circumstances arising during the prescribed period.

5.2 Queensland

Part 3 of the Qld Regulation sets out a process for dealing with 'eligible lease disputes'. Eligible lease disputes are:

- 'affected lease disputes', being any dispute concerning the liabilities or obligations of the parties to an affected lease arising during the response period, including a dispute about negotiating, or failing to negotiate, rent under Part 2 of the Qld Regulation; and
- 'small business tenancy disputes', being any dispute about a small business lease (a lease of premises used wholly or predominantly for carrying on a small business), or about the use or occupation of the leased premises.

A 'small business' is a business carried on by a sole trader or a business employing fewer than 20 full-time, or full-time equivalent, employees.

4 A consideration of the nature of commercial or retail leases governed by the various jurisdictions' legislation is beyond the scope of this note. Careful regard must be had to whether the tenancy dispute falls within the legislative ambit of the dispute resolution mechanisms.

If the renegotiation of an affected lease fails, either party may apply for mediation to the Small Business Commissioner by giving the Commissioner a dispute notice. However, the parties must attempt to resolve the dispute between themselves before making the application to the Small Business Commissioner by cooperating and acting reasonably and in good faith.

If the Commissioner accepts the dispute notice, the Commissioner will nominate a mediator and a time and date for the mediation (which must be at least seven days after the notice is given).

A party must attend the mediation (whether through an agent, officer or employee), unless it has a reasonable excuse. The Qld Regulation does not give any guidance as to what constitutes a 'reasonable excuse'. The parties may be represented by a solicitor at the mediation, but only if the mediator considers that representation would assist the parties in mediating an outcome.

If the parties reach an agreement at the mediation, the settlement agreement must be recorded in writing and signed by the parties. The mediator will then notify the Small Business Commissioner that the dispute has been resolved.

Unless otherwise ordered by a court or QCAT, each party must pay its own costs incurred in relation to the mediation. The Small Business Commissioner must pay the mediator's fees and costs for the mediation.

A mediator must not mediate an 'eligible lease dispute' if:

1. the dispute is about an issue between the parties that:
   (a) is the subject of retail shop lease arbitration;
   (b) has been the subject of an interim or final award in a proceeding for a retail shop lease arbitration; or
   (c) is before, or has been decided by, a court; or
2. the dispute relates to a lease of premises used for the carrying on of the business of a service station mentioned in section 97(1)(c) of the Retail Shop Leases Act 1994 (Qld).

If a provision of an affected lease or a small business lease requires or permits a dispute under or about the lease to be dealt with using a particular procedure, the provision does not prevent a party from starting mediation under the Qld Regulation, even if the procedure under the lease has not been complied with.

The dispute resolution process set out in the Qld Regulation does not prevent the parties agreeing to undertake a dispute resolution process other than as provided for under the Qld Regulation.

For example:

1. *Both parties to an eligible lease are medium to large enterprises who agree to resolve the dispute by appointing an arbitrator.*
2. *A party to an eligible lease dispute commences mediation proceedings under the Qld Regulation. The mediation is unsuccessful, so the parties agree to appoint an arbitrator under the terms of the lease to resolve the dispute.*
3. *The parties to an eligible lease dispute agree to resolve the dispute using one of the following methods:*
   (a) *a dispute resolution process provided for under the lease or a mandatory industry code;*
   (b) *a mediation process agreed to between the parties; or*
   (c) *referral of the dispute to arbitration conducted under guidelines published by the Small Business Commissioner.*

If an eligible lease dispute arises in relation to a retail shop lease, the dispute resolution process under the Qld Regulation will apply rather than the process under the *Retail Shop Leases Act 1994* (Qld). The dispute resolution process under the Qld Regulation and the *Retail Shop Leases Act 1994* (Qld) are quite similar. However, the Qld Regulation affords greater scope to the parties in terms of who may attend. The Qld Regulation also provides that all eligible lease disputes are referred the Small Business Commissioner.

5.3 Victoria

The Vic Regulations provide that:

- a landlord or tenant may refer an 'eligible lease dispute' to the Small Business Commission for mediation; and
- a party cannot commence proceedings in VCAT or a court in relation to an 'eligible lease disput'e until the Small Business Commission has certified in writing that the mediation has failed or is unlikely to resolve the dispute.

An 'eligible lease dispute' will be a dispute about the terms of an 'eligible lease' that arises in relation to a matter to which the Vic Regulations apply.

Mediation process

The mediation process under the Vic Regulations is similar in operation to the existing mediation and dispute resolution processes for retail tenancy disputes under the *Retail Leases Act 2003* (Vic).

Mediation is not limited to formal mediation procedures and extends to preliminary assistance in dispute resolution, such as the giving of advice to ensure that the landlord and the tenant are fully aware of their rights and obligations and to ensure there is full and open communication between the landlord and the tenant concerning the matter.

The Vic Regulations prohibit parties from using mediation to prolong or frustrate reaching an agreement.

The steps for mediation can be located at the Vic Small Business Commission website at: https://www.vsbc.vic.gov.au/your-rights-and-responsibilities/retail-tenants-and-landlords/.

The process will require parties to lodge an application for mediation, participate in pre-mediation resolution assistance and attend mediation. If settlement is not achieved, mediation ends and either party may apply to VCAT or the courts for a decision on their dispute.

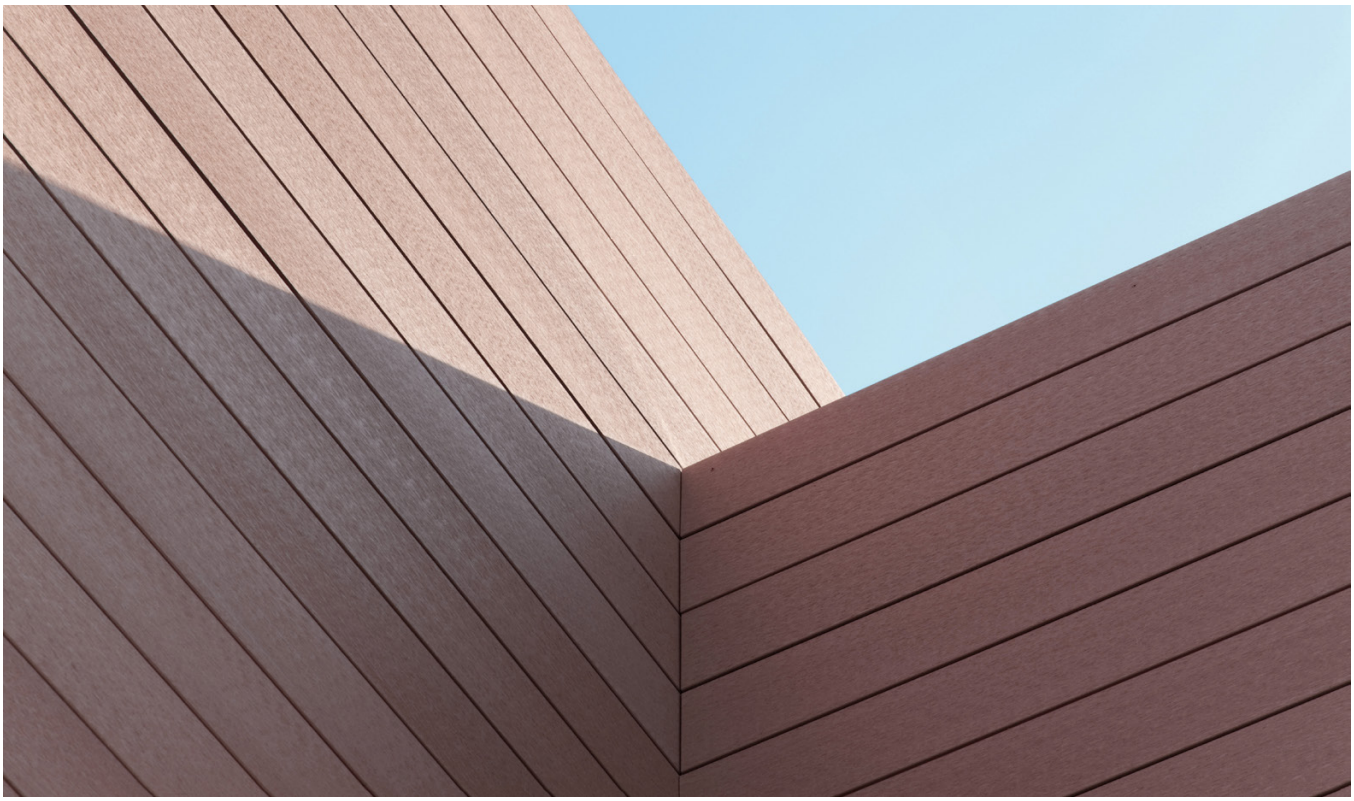
For further details on proceedings post mediation, please see Section 14.5.

5.4 Western Australia

Under the WA Act, if the lease is a small commercial lease (as defined in the WA Act) or the landlord is the owner or operator of a small business and the lease is granted in the course of that business, the parties can have recourse to the dispute resolution processes available to small businesses under the Small Business Act WA, namely they can request the Commissioner to:

1. provide assistance to attempt to resolve the dispute in accordance with section 15C of the Small Business Act WA; or
2. undertake alternative dispute resolution in respect of the dispute under section 15E of the Small Business Act WA.

It is a function of the Commissioner to provide assistance to attempt to resolve such disputes and under section 15E of the Small Business Act WA the Commissioner may appoint a person with appropriate skills and experience to conduct the alternative dispute resolution.



6 How should parties consider 'the spirit' of the *Competition and Consumer Act* when negotiating their arrangement?

6.1 General position

The reference to the *Competition and Consumer Act 2010* (Cth) (**CCA**) in the Code confirms that the Code is not intended to contradict the prohibitions in the CCA.

The cartel provisions in the CCA strictly prohibit any form of agreement or informal understanding that has the purpose or effect of fixing prices, or the purpose of limiting output, allocating customers or markets or rigging bids. The CCA also contains a prohibition on information sharing (principally between competitors) that has the purpose or effect of substantially lessening competition.

The Code is not intended to intervene in the process of individual landlords agreeing tailored, bespoke and appropriate arrangements with each of their SME tenants (or to mandate a collective industry position). Likewise, the specifics set out in the Appendix to the Code are said to be practical examples for illustration only.

Competition risks could arise if competing landlords were to share information about, or seek to agree upon, rent deferrals or waivers, or capacity reductions - irrespective of whether those arrangements would benefit (rather than disadvantage) their tenants. If those types of conduct are contemplated, Australian Competition and Consumer Commission (**ACCC**) authorisation (which provides immunity for specified conduct) should be sought. Authorisation will be granted if the ACCC considers that the reduction in competition and any other public detriment arising from the conduct is outweighed by its public benefit.

Practically, the ACCC has been clear that it is sensitive to the current circumstances and to businesses seeking to enter joint arrangements during COVID-19 that are in the public interest. While obtaining authorisation be complex and costly, the ACCC recently (and within 24 hours) issued an interim authorisation to the Shopping Centre Council of Australia and Scentre Group to enable them to discuss, share information, and agree a rent relief package for SME tenants, including through deferment or amelioration of rent or other payments.

6.2 What is the position in regards to collective bargaining?

On 22 April 2020, the ACCC granted interim authorisation allowing retailers to collectively bargain with landlords for rent relief during the COVID-19 pandemic.

The interim authorisation applies to the Australian Retailers Association (**ARA**) and its current and future members. The scope of this authorisation is not limited to SME tenants or ARA members who are SME tenants. The inclusion of future ARA members in the scope of authorisation leaves open the possibility that non-member retailers could join the ARA and take advantage of the ACCC authorisation. This is particularly relevant considering the application anticipates a 12 month authorisation period, requested by the ARA.

The authorisation seeks to have regard to and "advance the objectives of the Code," but its scope is not limited by the Code.

The interim authorisation allows retailers to:

1. share certain information surrounding the impact of the COVID-19 crisis on their business and the positions of their landlords;
2. collectively bargain with landlords about rent relief during the COVID-19 pandemic; and
3. share information relevant to the negotiations, including in relation to requests by landlords for certain information as part of considering and negotiating support in the context of COVID-19.

While the interim authorisation promotes collective bargaining, it should be noted that the interim authorisation:

1. does not allow the ARA and its members to discuss or share information surrounding:
   (a) actual rental amounts under existing or proposed leasing arrangements; or
   (b) Sensitive Rent Information (e.g. previous incentives offered by landlords);
2. does not override contractual obligations, including any confidentiality clauses regarding information disclosure;
3. does not compel landlords to negotiate with the bargaining groups of retail tenants. Landlords may decide to deal with tenants on an individual basis; and
4. does not compel tenants to participate in collective bargaining(tenants will still be free to negotiate individual arrangements).

The interim authorisation is temporarily in place while the ACCC considers the substantive application. The ACCC may review their decision on this interim authorisation at any time. A public consultation process has not yet been entered into, but the ACCC will conduct such a consultation process on the substantive application.

Application of the Leasing Principles

7 How far does the moratorium on termination in Leasing Principle 1 extend?

The prohibition on landlords terminating the leases of SME tenants, which was central to the development of the Code, is contained in Leasing Principle 1.

> Leasing Principle 1
>
> *Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or a reasonable subsequent recovery period).*

The Code does not consider a moratorium on termination rights beyond a prohibition on termination due to a failure to pay rent. Literally, SME Tenants will not be able to rely on Principle 1 to prevent termination in circumstances where other terms in the lease are breached giving rise to a landlord right to terminate.

Attention must be paid to other rights in the lease, statute and general law, as separate to the Code, to protect the rights of an SME tenant or landlord in the case of a breach of lease that is not the non-payment of rent or another prescribed breach under the relevant State or Territory instrument (e.g. a failure to repair). It should be noted that, particularly in the current pandemic circumstances, equitable relief will tend to favour the tenant when considering the rights of landlords to terminate for breach.

As is the case with many aspects of the Code, the substance of Leasing Principle 1 has been implemented under the implementing legislation in each State in different ways. We have set out the position adopted in each State regarding Leasing Principle 1 and other actions under 'Prescribed Actions' in the table in Annexure 2.

8 What is the meaning of 'substantive' and 'material' terms in Leasing Principle 2 of the Code?

The words 'substantive' and 'material' need to be viewed through the intent of Leasing Principle 2. That Principle is a quid pro quo given by tenants for the various concessions required of landlords (including that contained in Leasing Principle 1 prohibiting landlords from terminating a lease for non payment of rent during the COVID-19 pandemic period).

> Leasing Principle 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.*

8.1 Consequence of non-compliance with Leasing Principle 2

Whilst the Principle is focused on the actions of the tenant, the consequence of a tenant not complying with Leasing Principle 2 is that it forfeits the protections provided under the Code. As a key example, that would remove the protection contained in Leasing Principle 1 – meaning (in theory) the landlord could terminate the lease for non-payment of rent.

In this way, whilst Leasing Principle 2 is cast as a positive obligation on tenants, interpretation of Leasing Principle 2 will be critical to a landlord's assessment of what rights it has arising from tenant breaches during the COVID-19 pandemic period.

8.2 Meaning of 'material' and 'substantive'

The phrase 'material failure to abide by substantive terms' is not the usual language used when referring to the failure of a party to comply with an express term of a lease. From this we infer that the drafters of the Code require the tenant's failure to be something more than a mere breach of a lease term, and that even where considered a 'material failure', the relevant term in question must also be 'substantive' in character.

Meaning of 'material'

The courts have previously interpreted a material breach as being 'of moment or of significance, not merely trivial or inconsequential'.[5]

Therefore under Leasing Principle 2, at a minimum, the SME tenant's breach must be of moment or of significance and not merely trivial or inconsequential.

We would also expect that in the context of the Code (and the underlying crisis of COVID-19), that whether a breach is sufficiently 'material' will also be assessed by reference to the stated purpose and other Principles of the Code and the nature of the crisis (and its consequences) generally.

Meaning of substantive

It is less clear what terms of a lease should be considered 'substantive', as that word is not usually used when describing lease terms and has not been judicially considered in this context.

Substantive has the following relevant definitions in the Macquarie Dictionary – belonging to the real nature or essential part of a thing, real or actual, of considerable amount or quantity'. In addition, in his comments on 7 April 2020, the Prime Minister equated abiding to the 'substantive terms' of a lease to 'honouring the lease'.

Whilst the above definitions and the Prime Minister's comments closely resemble judicial interpretations of 'essential' terms of contracts, it is notable that the Code does not use the term 'essential'. Nevertheless, particularly when viewed in the context of the Code as a whole, we expect that the correct interpretation would not fall far from the settled meaning of an 'essential term of the lease'.

From a practical stand point, we therefore think that the meaning of 'substantive' in this context falls somewhere in between the following extremes on the spectrum of possible interpretations:

1. Landlords may argue that a material breach of any provision of a lease amended under the Code should deny the tenant access to the protections of the Code. This argument would posit that the amendments to a lease under the Code function as one package and a material breach of any of the amended terms is therefore 'substantive' as all terms are essential to the bargain made between the parties.
2. Tenants may argue that their access to the protection of the Code is only lost if they commit a material breach of an **essential** term of the lease. As an 'essential term' is narrowly defined by the law to mean only those terms at the real heart of a contract this would be a very restrictive view.

There are obviously difficulties with arguing either of these extreme positions, and so it is likely that the correct interpretation lies somewhere between the two. Distilling the correct interpretation will necessarily require all the facts of a particular lease term to be assessed, but as a guide, not all terms of a lease will be considered sufficiently substantive, but also, the class of terms considered substantive may be broader than those that are judicially accepted as being essential terms.

8.3 Key thoughts

To be a material failure, the tenant's relevant breach of the lease must be 'of moment or of significance, not merely trivial or inconsequential'.

The relevant term that has been breached, must be 'substantive' – such that the term is of some importance and is essential to the lease. Whilst this use of 'essential' has an ordinary and not a common law meaning, in the broader context of the Code we expect that the meaning will (in practice) be very close to the judicial meaning of an 'essential term', assessed on all the facts.

Our view is that Leasing Principle 2 must be interpreted in the context of the stated purpose of the Code, the good faith overlay of the Code and the Prime Minister's comment that tenants must 'honour their leases'. Tenants should not seek to use the Code as an excuse not to comply with their lease terms, but equally, landlords should not seek to use all breaches as an excuse to deny the tenant access to the Code protections, especially where the breach is not causing real loss to the landlord or can be mitigated/ remedied in another way which preserves the lease.

5 *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 110 ALR 367 at 371; applied in *Brand v Digi-Tech (Australia) Ltd* [2002] NSWSC 416 at [1192].

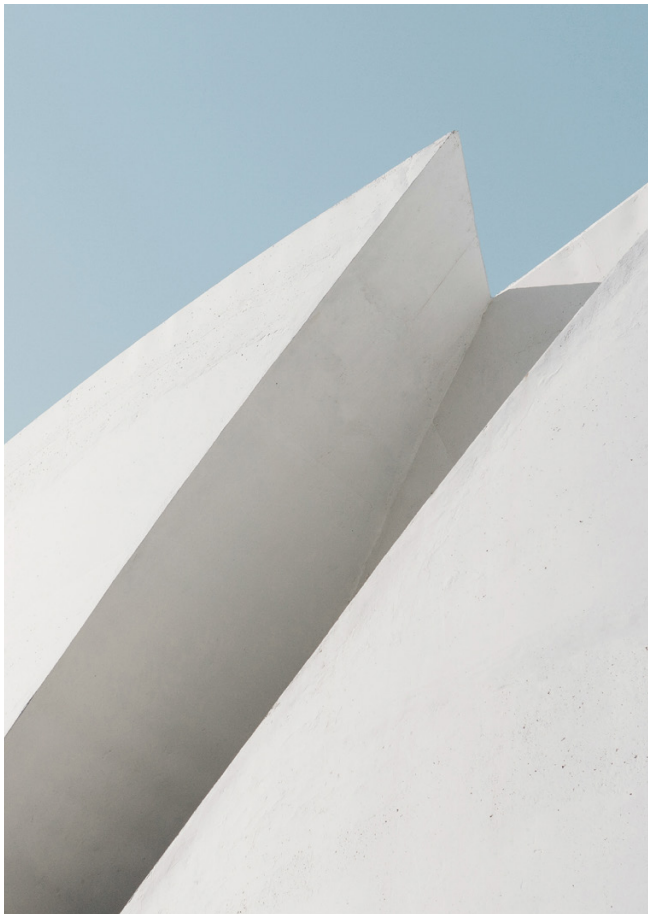
9 How will rent deferrals be amortised?

Leasing Principles 3, 4, 5 and 9 of the Code set out the mechanism whereby the rent payable under a lease is waived or deferred for those tenants that qualify for relief under the Code during the COVID-19 pandemic period and a 'reasonable subsequent recovery period'.

It is clear that, like with many of the principles of the Code, the arrangements surrounding the waiver and amortisation of deferred rent will need to be negotiated and agreed between landlords and tenants on a case-by-case basis. Of course, the general obligation for the parties to act in good faith will apply (as discussed above).

The mechanism for amortising the deferred rent and the related recommendation to extend some leases present a number of challenges from a practical perspective, which we have summarised below.

> Leasing Principle 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.*



9.1 Amortisation period under each set of Regulations

Each jurisdiction has unique requirements for the amortisation of deferred rent across the balance of the lease term, which is identified in the following table:

NSW	Qld	Vic	WA
The NSW Regulation does not contain corresponding provisions. Good faith negotiation under the NSW Regulation should have regard to leasing principles under the Code (inclusive of those providing for deferred rent).	Unless the parties otherwise agree, the variation of lease between the parties giving effect to the repayment of deferred rent must: not require payment of the deferred rent until after the end of the response period; require payment of the deferred rent to be amortised over a period of 2 to 3 years; and not require the tenant to pay interest or any other fee or charge in relation to an amount of deferred rent, unless the tenant fails to comply with the conditions on which the rent is deferred.	Unless the parties otherwise agree, the deferred rent is amortised over the greater of: • the balance of the term of the eligible lease (as extended under the Vic Regulations); and • a period of no less than 24 months. The method of amortisation is as agreed between parties. The landlord may not require a tenant to pay any interest, fee or charge for a deferral. The Vic Regulations provide that this regulation does not apply if the landlord and tenant agree otherwise.	Unless the parties otherwise agree, the parties must vary the lease, or otherwise agree, so that the tenant must pay the deferred rent to the landlord amortised over the greater of the following: • the balance of the term of the lease; or • a period of not less than 24 months. If the parties have entered into an agreement regarding rent relief and tenant believes that the rent relief provided under that agreement is less favourable than the rent relief obtainable under the WA Regulation, the tenant may make a request for rent relief under the WA Regulations and the process regarding rent relief in the WA Regulation must be followed.

9.2 Amortisation period for payment of deferred rent

This period of amortisation of the deferred rent will be over the balance of the lease term and for a period of at least 24 months (unless otherwise agreed between the parties). For example:

1. If a lease has a remaining term of three years after the pandemic period ends, any rent deferral agreed between the parties will be amortised over that three year period.
2. If a lease has a remaining term of one year after the pandemic period ends, the tenant is entitled to a period of two years to repay the deferred rent.

In circumstances where the balance of the lease term is less than two years, the parties may consider:

- agreeing to shorten the amortisation period, assuming that the tenant has the financial capability to do so;
- extending the term of the lease to allow the tenant sufficient time to repay the deferred rent so as to not compromise the tenant's ability to fulfil its ongoing obligations under the lease;
- entering into an agreement whereby the tenant would continue to repay the deferred rent after expiry of the lease; or
- agreeing a higher percentage of rental waiver as opposed to deferred rent.

In relation to option one, tenants with a lower financial income will have difficulty in paying the deferred rent, in addition to the rent that is otherwise due and payable, over a more condensed period. The prevalence of tenants being in this situation is likely to increase following the economic impact of COVID-19. The principles in the Code also indicate that a higher percentage of rent relief should be applied towards rental waivers (as opposed to deferred rent) where a tenant's capacity to fulfil its ongoing lease obligations would otherwise be compromised.

Option two may be unattractive to a landlord with a problematic tenant with a history of non payment of rent. Conversely, the option to extend a tenant's lease will give a landlord certainty of rental payments in the future.

Before agreeing to an extension of the lease term, regard will need to be given to any future plans a landlord has for the premises or complex, e.g. binding heads of agreement with third parties for premises following expiry of an existing lease and potential first rights of refusal over premises. Whether the landlord is obliged to honour such commitments will need to be considered on a case-by-case basis.

Option three presents potential risks for a landlord in relation to the enforcement of the payment of the deferred rent without having the benefit of rights under a lease, which may expose a landlord to greater risk. At a minimum, the agreement would need to make provision for:

- when the deferred payment would commence;
- the duration for payment of the deferred rent;
- consequences for failure to pay; and
- the form of security provided by the tenant if it fails to pay.

While more attractive to a tenant, option four will obviously present cash flow issues for a landlord.

9.3 Extensions or variations

Any extension or variation to the lease terms will need to be documented in the form of a deed signed by the parties and, if the lease is registered, registered with the relevant Land Registry to ensure enforceability and indefeasibility of the agreed extensions or variations.

Consideration will need to be given to the following matters, inter alia:

- extensions of lease on a case-by-case basis. For example, for short term leases, the consequence of granting an extension may mean that the lease no longer qualifies as a 'short term lease' and is not afforded protections in relation to indefeasibility. Conversely, the consequence of granting an extension to a lease may mean that foreign investment review board approval is required or the lease requires local government approval as it is a deemed subdivision and may trigger a new lease for the purposes of existing retail tenancy legislation;
- how the tenant will provide financial information to the landlord to determine the level of rental waiver or deferred rent;
- assessment (both initial and ongoing) of the tenant's eligibility for relief;
- the party responsible for the costs associated with preparation of the extension of lease; and
- other issues specified in more detail below.

9.4 What if the tenant is in hold over?

The amortisation of deferred rent may also pose issues where a tenant is occupying the premises under a holding-over arrangement, where there is no definitive timeframe for repayment of the deferred rent. In this scenario, the parties may agree to enter into a new lease with a term not less than two years.

9.5 Incentives

Regard must also be had to the payment or provision of incentives under leases. For instance, incentives offered by way of rent reductions or rent free periods will likely be affected by the amortisation of the deferred rent. It will be a negotiating point for the parties to determine whether such incentives will continue to apply throughout the COVID-19 pandemic period and reasonable subsequent recovery period, or whether the provision of the incentives will be

frozen and commence again on the expiry of the reasonable subsequent recovery period.

Specifically in relation to rent reductions, the parties will need to determine how such rent reductions are applied to any deferred rent payments that are amortised.

Landlords and tenants should also turn their minds to incentives such as capital or fitout contributions documented by way of a deed separate to the lease. Consideration will need to be given to:

- how a landlord will comply with an obligation to provide a capital or fitout contribution to a tenant; and
- whether a landlord will have any recourse in respect of recovery of incentives paid, in circumstances where such incentives are calculated on the basis that the tenant continues to pay the agreed rent during the lease term.

These issues will be a matter for negotiation between the landlord and tenant at a commercial level.

9.6 Default and termination

Landlords may have concerns regarding their ability to recover deferred rent in circumstances where a tenant fails to pay the deferred rent and seeks to terminate the lease (obviously following the COVID-19 pandemic period given Leasing Principle 1 of the Code, which places a prohibition on the termination of a lease due to non-payment of rent during the COVID-19 pandemic period). The deferred rent should be treated in the same manner as the usual rental payments in regards to a failure by the tenant to pay such deferred rent, i.e. it constitutes a default under the lease.

Any agreement between the parties regarding the payment of deferred rent will need to set out some clear principles as to the consequences for failure to pay, including:

- default; and
- draw down on security held by the landlord (noting that special consideration will need to be given as to how the landlord is able to draw down on a form of security where the lease has expired).

10 What is the Australian Bankers Association's COVID-19 response and what are the benefits of deferral of loan payments under Leasing Principle 7 of the Code?

Leasing Principle 7 requires that landlords share the benefit of any loan repayments proportionately with their tenant.

> Leasing Principle 7
>
> *A landlord should seek to share any benefit it receives due to deferral of loan payments, proved 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.*

Leasing Principle 7 refers to 'the Australian Bankers Association's COVID-19 response' as well as any other case-by-case deferral.

Banks have generally refused to waive principal or interest (in the sense of writing off principal or interest). There are some fees being waived but presumably this will not extend to material fees such as line fees. The benefit that banks are giving is conceptually a deferral of principal payments and/or interest. That is quite different conceptually to a rent waiver. In a purely economic sense, that might be worth nothing at all to the landlord over the life of their loan (some banks have at least agreed to waive interest on the capitalised interest, which would otherwise mean the landlord would be worse off over the life of the loan).

As a result of the above, the following questions arise:

1. How would a landlord calculate any benefit from a deferral of amortisation or interest capitalisation?
2. How would a landlord disclose the position (in view of confidentiality that banks will absolutely want to preserve) particularly if the landlord advises the tenant the landlord has no benefit whilst the tenant market that has been told that banks are waiving payments?
3. In the case that a landlord receives benefits, how should those benefits be properly allocated where a landlord has a portfolio of properties?
4. In the case that a landlord receives benefits, how should those benefits be properly allocated where a landlord get benefits from some financiers, and not from others?

For many landlords, amendments to lease terms will require bank consent, even where there are no ratio (e.g. interest cover or net rental) covenants that need to be waived or varied.

For completeness, the official Australian Bankers Association policy is to assist businesses with total business loan facilities of up to $10 million. Assistance for anyone else is case-by-case or bank-by-bank, meaning that there won't be certainty for landlords as to availability or timing of relief.

11 What is the position concerning tenants securities?

Leasing Principle 11 of the Code sets out the position on a landlord's ability to draw on a tenant's security.

> **Leasing Principle 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.*

Leasing Principle 11 appears to impose a complete moratorium on a landlord's ability to draw on a bank guarantee, cash bond or personal guarantee for the non-payment of rent during the COVID-19 pandemic (and or a reasonable subsequent recovery period).

Each jurisdiction has different restrictions on a landlord's ability to draw on security under a lease, which are identified in the following table.

NSW	Qld	Vic	WA
A prescribed action includes recovery of the whole or part of a security bond under the commercial lease. A landlord will not be prevented from taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic. Nothing prevents a landlord and tenant agreeing to take any action in relation to the commercial lease (including the landlord taking any prescribed action, i.e. recovery of a security bond).	A landlord cannot take recourse against security provided in respect of non-payment of rent. There is no restriction on a landlord from taking action, including drawing down on security under an eligible lease, for breaches of the eligible lease other than non-payment of rent.	A prohibited action includes recovery of the whole or part of any security for the performance of the tenant's obligations under the small commercial lease (including, without limitation, a security bond). There are no corresponding provisions in the WA Regulations allowing the landlord to take a prohibited action that is unrelated to COVID-19.	A prescribed action includes a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings. The prohibition on prescribed action does not apply to a ground that is not related to the effects of COVID 19. A landlord is entitled to retain any security deposit (interestingly this only mentions a security deposit and does not explicitly reference a bank guarantee or indemnity) after the lease ends and claim in relation to this security deposit (on the conditions in the lease in effect immediately before the lease expired) until the deferred rent has been paid.

11.1 Tenant security types

A tenant's security under a lease usually takes the form of a bank guarantee, cash bond or personal guarantee. We set out below the usual operation of each type of security, including considerations for landlords and tenants in light of the moratorium imposed by the Code.

11.2 Bank guarantee

Security by way of a bank guarantee is an unconditional and irrevocable promise from a bank (usually a bank approved by the landlord), in favour of the landlord, to assume liability for the tenant in the event that the tenant does not meet its obligations under the lease (or any ancillary documents). Most landlords require that bank guarantees do not have an expiry date (or at least if they have an expiry date, it expires a couple of months after the expiry date of the lease, including any options to renew).

If any bank guarantees held do not extend beyond any lease extension contemplated by Leasing Principle 12 of the Code (which is likely to be the case), then the tenant will need to provide a replacement bank guarantee or they will presumably be in automatic breach of a fundamental term of the lease.

Tenants should consider how the bank guarantee amount is determined under their lease. Some leases will stipulate a bank guarantee amount equivalent to a certain number of months of rent payable under the lease. Consideration will need to be given to how any rental waiver or deferred rent will impact on the amount of the bank guarantee.

Given that most bank guarantees are expressed as being unconditional and irrevocable in favour of the landlord as favouree, it is difficult to predict how the legislation will effectively bar landlords from drawing down on bank guarantees. Furthermore, it remains to be seen how a landlord may be prevented from drawing on a bank guarantee for a default by a tenant that is unrelated to the COVID-19 pandemic or relates to a default that occurs prior to the pandemic period.

11.3 Cash deposits

Cash deposits are money (usually in the form of a bank cheque) deposited with the landlord by the tenant as security for the tenant's obligations under the lease. Each State and Territory has varying requirements in respect of the treatment of cash deposits, particularly under leases which are subject to retail leasing legislation. In some jurisdictions, the landlord requires tenant sign-off to draw down on a cash deposit.

Landlords should ensure that any lease extension contemplated by Leasing Principle 12 of the Code does not render any cash deposit held 'unclaimed moneys' for the purposes of the *Banking Act 1959* (Cth). As with bank guarantees, it is difficult to predict how the legislation will effectively bar landlords from drawing on these cash deposits.

11.4 Personal guarantees

Leases to corporate entities may contain a personal guarantee whereby a director(s) of the tenant company guarantees the obligations of the tenant under the lease. An unlimited personal guarantee exposes the guarantor's assets to creditors of the tenant.

Landlords and tenants should carefully review their leases to ascertain when a personal guarantee is claimable by the landlord and the limitations or restrictions imposed on the ability of the landlord to claim against the guarantor. Favourably for landlords, most personal guarantees will not be subject to any time limitation.

12 What considerations should be borne in mind in relation to the extension of lease terms under Leasing Principle 12 of the Code?

Leasing Principle 12 requires eligible tenants to be offered an extension of their lease term (on the existing lease terms) for a period equivalent to the period of the waiver/deferral. The intention of such an extension is that it provides tenants an opportunity to trade during the 'recovery period' following the conclusion of the COVID-19 pandemic. Foreign Investment Review Board (**FIRB**) implications are considered in question 15 below.

> Leasing Principle 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 Principle 2. 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.*

12.1 Does the amendment constitute the grant of new lease?

Increasing the lease term or adding one or more options for renewal may constitute a surrender by operation of law and the grant of a fresh lease. The length of the extension relative to the term and the intention of the parties will be relevant to the determination. A surrender and re-grant can have a number of implications discussed in more detail below.

12.2 How will this apply to retail leasing legislation?

In Victoria, Queensland and Western Australia, whether or not a lease is subject to the respective Retail Leases Act is determined at the time of entry into the lease. The position is different in New South Wales where a lease can move in and out of the Retail Leases Act during the term of the lease.

In either circumstance, if the extension of an existing lease term constitutes a surrender and re-grant of a new lease, an assessment will need to be made regarding whether the lease is subject to the Retail Leases Act (as the tenant's use may have changed or the classification of that use become clearer by virtue of the recent case law in this area).

If the lease is subject to the Retail Leases Act there are a number of associated issues which both landlords and tenants will need to consider. These include disclosure obligations (see below) and whether a 5 year waiver certificate is required as well as ensuring that any provisions of the leases which are contrary to the Retail Leases Act are amended accordingly. Please refer to Annexure 4.

12.3 What are the landlord's disclosure obligations?

If the lease is a retail lease landlords will need to ensure that the relevant disclosure obligations under the Retail Leases Act are complied with (for renewals or if the variation is a surrender and re-grant). Notably, the Qld Regulation specifically stipulates that the disclosure obligations under the *Retail Shop Leases Act 1994* (Qld) do not apply to variation of leases agreed under the Qld Regulation.

12.4 Renewal terms

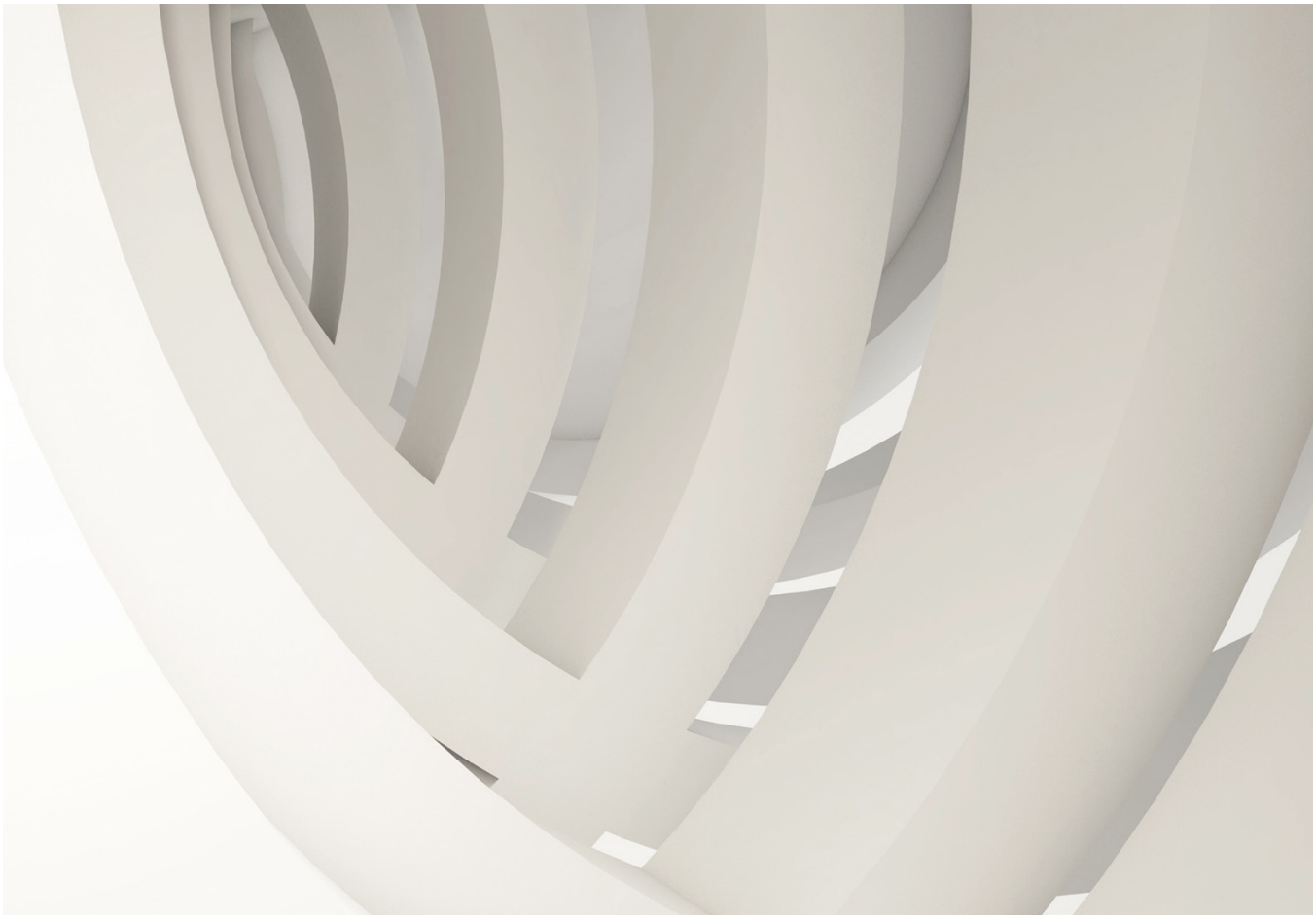
Whilst the Code states that tenants should be offered an extension of the lease on existing lease terms, the impact on a freeze on scheduled rent increases (Leasing Principle 13), restriction on lease termination for non-payment of rent (Leasing Principle 1) and requirement for any repayment obligations to apply over an extended period (Leasing Principle 9) will need to be reflected in the relevant extension deed.

12.5 Security

Landlords should ensure that additional/replacement security is obtained from tenants to cover the renewed lease term. This is especially relevant where the original security provided by the tenant has an expiry date prior to the new expiry date of the lease.

12.6 Tax implications

There is potential for a surrender and re-grant or a lease variation to constitute a capital gains tax (**CGT**) event. This is generally not an issue for arms-length commercial leases however consideration should still be given to this, particularly when dealing with ground leases. If the initial lease was dutiable, the surrender and re-grant may also be a dutiable event but this can vary between states. Further commentary on potential tax implication are explored in section 17.



Legislative position of States and Territories

For an analysis of how the Leasing Principles are likely to apply to the relevant tenancy legislation of the below States, please see Annexures 3 and 4.

13 New South Wales

On 24 April 2020, NSW Parliament enacted the NSW Regulations, pursuant to the emergency legislation (the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW)) which commenced on 25 March 2020.

13.1 Enactment and interaction with the Code

The NSW Regulations make explicit reference to the Code as released and adopted by the Federal Government. Negotiations between landlords and tenants, and dispute resolution processes must have regard to the leasing principles as set out in the Code.

The NSW Regulations commenced on 24 April 2020 and operate for a 'prescribed period' only (being a six month period).

13.2 Eligibility

A tenant will be an impacted tenant under the NSW Regulations if:

- the tenant qualifies for the JobKeeper Scheme; and
- the tenant's turnover in the 2018 – 2019 financial year was less than $50 million:
  - (a) if the tenant is a franchisee – the turnover of the business conducted at the premises,
  - (b) if the tenant is a corporation that is a member of a group– the turnover of the group,
  - (c) in any other case – the turnover of the business conducted by the tenant.

The NSW Regulations provide that turnover of a business includes any turnover derived from internet sales of goods or services. They also provide that corporations will constitute a group if they are related bodies corporate within the meaning of the Corporations Act.

As set out above, under the NSW Regulations turnover means:

- if the tenant is a franchisee - the turnover of the business conducted at the premises or land concerned,
- if the tenant is a corporation that is a member of a group - the turnover of the group,
- in any other case - the turnover of the business conducted by the tenant.

Franchisees

Consistent with the Code this is limited to the turnover of the business conducted by the tenant at the premises or land concerned and so would not include any overseas entities.

Tenants which are corporations

Under the Corporations Act, corporations are related if any of the following apply:

- one body corporate controls the board composition of another body corporate;
- one body corporate can control more than 50% of votes in a general meeting of another body corporate; or
- one body corporate holds more than 50% of the share capital of another body corporate

The composition of a body corporate's board of directors is deemed to be controlled by another body corporate if that other body corporate, by the exercise of some power exercisable by it without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors.

While not defined in the NSW Regulations, a corporation is defined in the Corporations Act as a company, a body corporate or an unincorporated body that may sue or be sued or may hold property in the name of its secretary or office holder. In basic terms a body corporate is an entity that has a separate legal entity which can sue or be sued, has members and has perpetual succession (i.e. it continues even if its members die or resign). A trust is not a body corporate.

Importantly the concept of related bodies corporate under the Corporations Act is limited to bodies corporate but does apply to overseas entities. This means:

- trusts whether in Australia or offshore would not be included in the definition of group; and
- an assessment would need to be made as to the specific nature of any relevant overseas entity (e.g. LLC or LP) to determine if that entity is a body corporate for the purposes of the Corporations Act.

As is the case with the annual turnover test under the JobKeeper Scheme, the ability of a landlord to verify the position of the tenant without a complete structure diagram of the 'group' and viewing the underlying documents in relation to distributions, voting power etc. is obviously limited.

Any other case

This would apply to entities other than corporations and franchisees e.g. trusts and is limited to the turnover of the business conducted by the tenant and so would not include any overseas entities. Unlike franchisees it is not limited to the business being conducted at the premises.

Turnover thresholds in the NSW Regulations reflect similar thresholds in the corresponding Vic Act enacting the Code.

In considering the eligibility criteria in relation to the JobKeeper Scheme, the word 'qualifies' is ambiguous, either meaning eligibility or alternatively actual participation. Guidance from the NSW Government has indicated that participation in the JobKeeper Scheme is not required and that eligibility is sufficient.

For what qualifies as a 'lease' for the purposes of the NSW Regulations, see Section 1.1 above.

13.3 Adoption of leasing principles under the Code

Prescribed Action

A 'prescribed action' means taking action or seeking orders or issuing proceedings in a court or tribunal for the following:

- eviction of the tenant from premises or land the subject of the commercial lease;
- exercising a right of re-entry to premises or land the subject of the commercial lease;
- recovery of the premises or land;
- distraint of goods (i.e. entering the premises and seizing goods to satisfy an unpaid debt);
- forfeiture;
- damages;
- requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a tenant;
- recovery of the whole or part of a security bond under the commercial lease;
- performance of obligations by the tenant or any other person pursuant to a guarantee under the commercial lease;
- possession;
- termination of the commercial lease; or
- any other remedy otherwise available to a landlord against a tenant at common law or under the law of New South Wales.

Importantly, the NSW Regulations also provide that a landlord will not be prevented from taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic. This is in line with Leasing Principle 2 of the Code which requires an impacted tenant to continue to comply with the terms of their lease.

Breach of commercial lease

The NSW Regulations expressly make note of corresponding Principles in the Code, and prevent a landlord from taking any 'prescribed action' against an impacted tenant on the grounds of a breach of the commercial lease during the prescribed period consisting of:

- a failure to pay rent (Leasing Principle 1); or
- a failure to pay outgoings (Leasing Principle 11); or
- the business operating under the lease not being open for business during the hours specified in the lease (Leasing Principle 14).

The wording of the provision suggests that a landlord is only prohibited from taking a prescribed action in response to one of the aforementioned breaches, if that breach occurred during the prescribed period. In our view, it is therefore likely that the NSW Regulations allow a landlord to take prescribed action on the grounds of a breach that occurred prior to 24 April 2020.

Prohibition on rent increases

As anticipated in Leasing Principle 13 of the Code, the NSW Regulations prevent a landlord from increasing an impacted tenant's rent payable during the prescribed period. In addition, once the six month prescribed period under the NSW Regulations comes to an end, the landlord cannot then take any prescribed action against an impacted tenant to recover rent increase amounts that would have otherwise been introduced during the prescribed period. These restrictions do not apply to turnover rent.

In our view, if an impacted commercial lease would otherwise have implemented a rent increase during the prescribed period (if not for the NSW Regulations and the Code), a landlord may still effect the rent increase but will not be entitled to:

- recover the increased rent during the prescribed period; or
- recover the increased rent which would otherwise have been payable during the prescribed period even after the prescribed period has come to an end.

In effect, the rent increase will only be notional during the prescribed period. However, after the prescribed period has come to an end, the landlord may immediately commence actually charging the tenant for the increased rent for each rent payment due after the end of the prescribed period.

The NSW Regulations also provide the provisions which restrict increasing an impacted tenant's rent during the prescribed period do not prevent the landlord and tenant agreeing to take any action in relation to the relevant commercial lease. The provisions which address the restriction on increasing impacted tenant's rent are brief and not clear on all aspects of how the restrictions should be implemented. As such, to minimise any confusion or

dispute with tenants (including less sophisticated tenants), landlords should consider seeking to include in any COVID-19 related rent abatement or concession arrangements provisions under which the tenant expressly acknowledges how any rent increases during the prescribed period will be handled.

See further commentary on GST impacts in Section 17.

Reduction in statutory charges

As in Leasing Principle 6 of the Code, the NSW Regulations provide that where a commercial lease requires an impacted tenant to pay a proportion of the landlord's insurances, statutory charge or land tax, if the amount that the landlord is required to pay is reduced, this benefit must be passed on to the tenant. The tenant will be exempted from making the relevant payment only to the extent of the reduction received by the landlord.

The NSW Regulations provide that the above prohibitions and restrictions on landlord conduct do not prevent a landlord and an impacted tenant from agreeing to take action in relation to the lease (including a mutual agreement to terminate the lease).

13.4 Obligation to renegotiate

Good faith negotiations

The NSW Regulations provide that where an impacted tenant is a party to a commercial lease, both the tenant and the landlord may request for the other party to renegotiate the rent payable and other terns of the lease. If a request to renegotiate is made, the parties must negotiate these matters under the lease in good faith.

When negotiating, the parties must have in mind both the economic impact of the COVID-19 pandemic and the leasing principles set out in the Code, including Leasing Principles 3 to 5 relating to waivers and deferrals of rent.

Requirement to attempt negotiations

A landlord cannot take or continue to take any prescribed action for a breach of lease for a failure to pay rent during the prescribed period unless they have complied with the above good faith negotiation provisions.

The requirement for a landlord to negotiate before taking prescribed action against a tenant for a breach consisting of a failure to pay rent, only applies to failures to pay rent which occurs during the prescribed period. This would suggest that a landlord can take prescribed action for a failure to pay rent before 24 April 2020, without having to first comply with good faith negotiation under the NSW Regulations.

The NSW Regulations also note that when a tenant is in breach of the lease for a failure to pay rent, this particular good faith negotiation provision is not intended to prevent parties from coming to their own tailored agreement (for example, the parties agreeing that the tenant continues to pay full rent). Rather, the provisions intend to prevent the landlord from taking unilateral actions without negotiating in good faith.

While outgoings would seem to be outside the regime, noting that this is analogous to consumer legislation, a tenant may argue that outgoings may be encompassed under the general term of rent.

The overall operation of these provisions and what is required to satisfy the requirement to undertake 'good faith' negotiations is unclear – particularly in circumstances where the parties agree an alternative arrangement which does not include waivers or deferrals of rent as contemplated by the Code. If an alternative arrangement is negotiated, it would be prudent for the landlord to obtain a written acknowledgement from the tenant under which they acknowledge they were offered an arrangement which complied with the Code (including which offered rent waivers and deferrals) and voluntarily elected to agree to the alternative arrangement.

13.5 Dispute resolution

For an in-depth discussion on the definition of 'impacted commercial leases' under the NSW Retail Regulation and mediations provisions under the NSW Regulations, please see Section 5 above.

Commercial leases regulated by the Retail Leases Act

The NSW Retail Regulation provides that disputes surrounding the negotiation of impacted commercial leases under the Retail Leases Act NSW, will be dealt with under existing dispute resolution mechanisms in Part 8 of the Retail Leases Act NSW.

If good faith negotiations fail, the Retail Leases Act NSW anticipates that parties should mediate their dispute by referring the dispute to the NSW Small Business Commissioner.

Where mediation with the NSW Small Business Commissioner fails to resolve a dispute, parties can apply to NCAT for a hearing to deal with the dispute. In prescribed circumstances, a party to proceedings in NCAT can apply for proceedings to be transferred to the Supreme Court of NSW.

The NSW Retail Regulation provides that NCAT or a court must have regard to the leasing principles under the Code when making a decision or order in relation to:

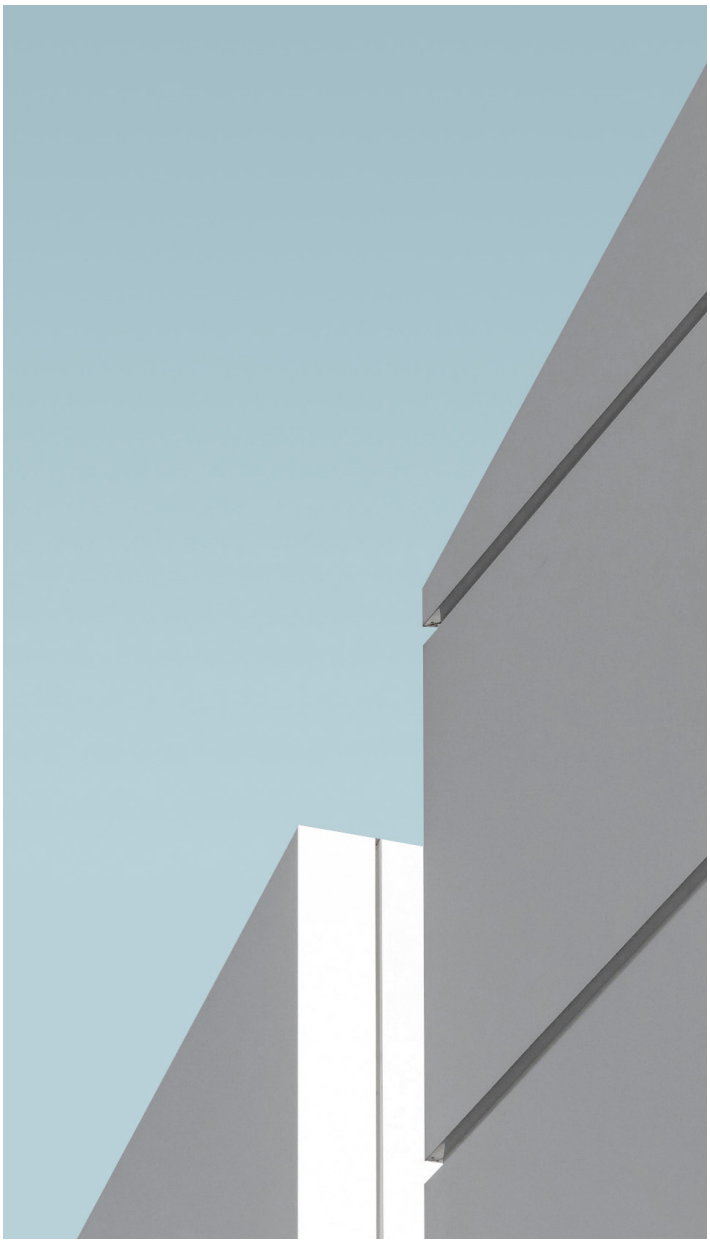
- the recovery of possession of premises or land from a tenant;
- the termination of a commercial lease by a tenant; and
- the exercise or enforcement of another right of a landlord of premises or land.

Commercial leases regulated by the Conveyancing Act

The NSW Conveyancing Regulations introduce the role of the NSW Small Business Commissioner to the Conveyancing Act NSW, requiring parties to attempt mediation with the NSW Small Business Commissioner before a landlord may take certain actions. For an analysis on the mediation provisions under the NSW Conveyancing Regulation, please see Section 5.1 above.

Similar to the NSW Retail Regulation, the NSW Conveyancing Regulation provides that a court must have regard to the leasing principles under the Code when making a decision or order in relation to:

- the recovery of possession of premises or land from a tenant;
- the termination of a commercial lease by a tenant; and
- the exercise or enforcement of another right of a landlord of premises or land.



14 Queensland

14.1 Enactment and interaction with the Code

On 28 May 2020, the Queensland Parliament enacted the Qld Regulation to give effect to the Leasing Principles detailed in the Code. The Qld Regulation does not make specific reference to the Code, but implements the Leasing Principles while also clarifying some gaps in the Code.

The 'response period' under the Qld Regulation is the period commencing on 29 March 2020 and ending on 30 September 2020.

14.2 Eligibility

The Qld Regulation applies to 'affected leases'. A lease is an affected lease if:

- it is a retail shop lease (as defined in the *Retail Shop Leases Act 1994* (Qld)) or a prescribed lease – being a lease for premises used predominantly for carrying on a business;
- as at 28 May 2020, the lease, or an agreement to enter the lease, is binding on the tenant;
- the tenant is an SME entity (as defined in the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020*); and
- the tenant, or an entity connected with, or an affiliate of, the tenant responsible for, or involved in, employing staff for the business carried on at the premises, is eligible for the JobKeeper scheme.

Unlike Victoria, the Qld Regulation only requires eligibility for the JobKeeper scheme, not participation.

The Qld Regulation does not apply to leases for premises used predominantly for a farming business or leases or other tenures under the *Land Act 1994* (Qld) (subject to certain exemptions).

The definition of 'SME Entity' under the Qld Regulation (as with Victoria) refers to the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020*), which is an entity that carries on a business or is a non-profit body during the current financial year and either:

1. has an annual turnover for the current financial year that is likely to be less than $50 million; or
2. carried on a business in the previous financial year, or was a non-profit body during the previous financial year, and its annual turnover was less than $50 million.

Comparatively, the NSW eligibility criteria (being turnover of less than $50 million in the 2018-2019 financial year) is narrower. An entity who in 2018-2019 may have had a turnover greater than $50 million but which is likely to have turnover in the current financial less than $50 million (perhaps by virtue of the COVID-19 pandemic itself) will be

eligible for protection under the Qld Regulation, where it would not be under the NSW Regulation.

Also of interest is the treatment of franchisors. Where the tenant under an affected lease is a franchisee, a lease to the franchisor of that premises occupied by the franchisee is also an *affected lease* irrespective of eligibility or lack thereof of the franchisor as an SME Entity.

14.3 Adoption of Leasing Principles under the Code

Restricted enforcement action

The Qld Regulation prevents a landlord from taking any 'prescribed action' in respect of a breach of an affected lease on the grounds of:

1. a failure to pay rent (Leasing Principle 1);
2. a failure to pay outgoings (Leasing Principle 11); or
3. the business operating under the lease not being open for business during the hours specified in the lease (Leasing Principle 14),

to the extent any of those things occur during the response period.

A 'prescribed action' is an action under a lease or another agreement relating to premises, or the starting of a proceeding in a court or tribunal, for any of the following:

1. recovery of possession;
2. termination of the lease;
3. eviction of the tenant;
4. exercising a right of re-entry to premises;
5. seizure of any property, including for the purpose of securing payment of rent;
6. forfeiture;
7. damages;
8. the payment of interest on, or a fee or charge relating to, unpaid rent or outgoings;
9. a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings;
10. the performance of an obligation by the tenant or another person under a guarantee under the lease; or
11. exercising or enforcing another right by the landlord under the lease or other agreement relating to the leased premises.

Like NSW, the Qld Regulation specifies that a landlord is not prohibited from taking these prescribed actions if they arise on grounds that do not relate to the effects of COVID-19. Also, importantly for landlords, these prescribed actions are not prohibited if undertaken in accordance with an agreed concession deed or similar agreement or if the landlord has made a genuine attempt to negotiate with the tenant and the tenant fails to negotiate in accordance with the Regulation. This is in contrast with the NSW Regulation which puts the onus on landlords to instigate negotiations,

and does not accommodate for non-responsive tenants leading to ambiguity in the NSW Regulation.

The Qld Regulations specifies that an act or omission of a tenant under an affected lease which is required under a COVID-19 response measure or a law enacted in response to the COVID-19 emergency will not amount to a breach of the lease and does not constitute grounds for termination of the lease or the taking of any prescribed action by the landlord against the tenant.

The above prohibitions and restrictions on a landlord's conduct do not prevent a landlord and tenant from agreeing to take action in relation to the lease (for example, the parties may agree to terminate the lease).

Prohibition on rent increases

As anticipated in Leasing Principle 13 of the Code, a landlord must not increase the rent payable during the response period (other than turnover rent). However, the Qld Regulation confirms that this does not prevent a landlord reviewing the rent under the lease during this period. The landlord is unable to pass on the increase to the tenant until the response period ends.

Negotiations to reduce, defer or waive rent (Leasing Principle 3)

Under Part 2 of the Qld Regulation, a party to an affected lease may, in writing, ask the other party to negotiate rent and other stated conditions of the lease. Following notice, the parties must, as soon as practicable, give each other accurate information relating to the request that is sufficient to enable the parties to negotiate in a fair and transparent way. For example, a clear statement about the terms to be negotiated or evidence the lease is an affected lease (including financial information).

Within 30 days of receiving sufficient information about a request, the landlord must offer the tenant a reduction in the amount of rent payable under the lease, and any proposed changes to other stated conditions. The offer must relate to any or all of the rent payable during the response period and provide for a waiver of at least 50% of the rent reduction offered (Leasing Principle 4). The offer should have regard to the matters listed in section 15(2)(c) of the Qld Regulation.

Once the tenant has received the landlord's offer, the parties must cooperate, act reasonably and in good faith in negotiating a reduction in the rent for the response period, including any related conditions. Either party may re-open negotiations if the ground on which the agreement for the reduction, deferral or waiver of rent is based on changes in a material way.

Any reduction, deferral or waiver of rent and any change in conditions of the lease should be documented through a variation of the lease.

The Qld Regulation makes clear that the parties are not restricted from entering into a concession deed or other agreement that is inconsistent with Part 2 of the Qld Regulation (e.g. inconsistent with the required waiver and deferral terms, the restriction on rent increases, the restriction on prescribed actions, etc.).

Provisions relating to deferral of rent

If the parties agree to defer rent, the Qld Regulation provides, among other things, the agreement must not require payment of deferred rent before the end of the response period, must require payment to be amortised over a period of 2-3 years, and no interest may be charged (unless the tenant fails to repay the deferred rent, or if the parties otherwise agree).

The Qld Regulation allows a landlord to retain any security deposit given to the landlord until the deferred rent has been paid, and to draw on the security (on the conditions of the lease immediately prior to expiry).

While retention of bank guarantees and other security instruments is not specifically noted, we expect the intention is for landlords to be able to retain and draw down on securities after the lease expires. Landlords should take particular notice of expiry dates for security instruments such as bank guarantees so as to ensure they are able to take advantage of this benefit.

Extending lease for period of deferral or waiver of rent (Leasing Principle 12)

If rent is waived or deferred, the landlord must offer the tenant an extension of the lease on the same conditions as in the lease except the rent payable during the extension is adjusted to account for the waiver or deferral. The extension must be equivalent to the period for which rent is waived or deferred.

The obligation to offer an extension only applies if the landlord is not subject to an existing legal obligation inconsistent with the obligation to extend (e.g. if the landlord has already entered into a binding heads of agreement with another tenant). Also, the obligation does not apply if the landlord can demonstrate the lease cannot be extended as the landlord plans to use the premises for its own commercial purposes.

Confidentiality

In line with other jurisdictions, the Qld Regulation contain specific provisions in respect of confidentiality.

A party to an eligible lease dispute must not disclose *protected information* obtained under or as a result of the operation of the Qld Regulation, other than:

1. with the consent of the party to whom the information relates;

2. to a professional advisor or financier who agrees to keep the information confidential;
3. to the extent the information is available to the public;
4. as authorised by the Small Business Commissioner; or
5. as authorised by law.

A party must not use *protected information* for any purpose other than negotiating or resolving an eligible lease dispute.

Protected information means:

1. personal information; or
2. information relating to business processes or financial information, including information about the trade of a business.

Personal information means the name, address and contact details of an individual, other than the landlord or tenant of the lease the subject of an eligible lease dispute.

14.4 Dispute Resolution

Part 3 of the Qld Regulation sets out a process for dealing with eligible lease disputes. Eligible lease disputes are:

1. *affected lease disputes*, being any dispute concerning the liabilities or obligations of the parties to an affected lease arising during the response period, including a dispute about negotiating, or failing to negotiate, rent under Part 2 of the Qld Regulation; and
2. *small business tenancy disputes*, being any dispute about a small business lease, or about the use or occupation of the leased premises.

There are two formal types of dispute resolution available under the Qld Regulation – mediation and QCAT proceedings. The parties must attempt to resolve the dispute through a mediation before commencing QCAT proceedings.

If resolution of the dispute without any formal process is not achievable, either party may apply for mediation to the Small Business Commissioner by giving the Commissioner a dispute notice.

A party to an eligible lease dispute may apply to QCAT for an order to resolve the dispute if the criteria listed in section 41 of the Qld Regulation are satisfied. QCAT will have jurisdiction to hear and decide the dispute unless any of the exceptions in section 42 of the Qld Regulation apply.

14.5 Services

If a tenant is unable to operate its business at its premises for any part of the response period as a result of the COVID-19 pandemic, a landlord may cease or reduce any services it provides to a premises to the extent it is reasonable in the circumstances (and subject to any reasonable request by the tenant).

15 Victoria

15.1 Enactment and Interaction with the Code

Like Queensland, but unlike New South Wales, the Vic Regulations do not expressly refer to the Code, but instead (together with the Vic Act) operate to generally reflect the Leasing Principles of the Code but with numerous important differences.

15.2 Eligibility

Eligible lease

The Vic Regulations apply to *eligible leases*. Subject to the carve outs noted below, an 'eligible lease' is:

1. retail lease defined in the *Retail Leases Act 2003* (Vic); or
2. a non-retail commercial lease or licence, being:
   (a) a non-retail lease of premises under which the premises are let for the sole or predominant purpose of carrying on a business at the premises; or
   (b) a commercial licence, sub-licence or agreement for a licence or sub-licence, under which a person has the right to non-exclusively occupy a part of the premises for the sole or predominant purpose of carrying on a business at the occupied premises. The licence need not be in writing or partly in writing and may be express or implied;
3. which is in effect on 29 March 2020; and
4. the tenant under which is, on or after 29 March 2020:
   (a) an SME entity, being an entity with an anticipated turnover for the current financial of less than $50 million, or an actual turnover for the previous financial year of less than $50 million; and
   (b) an employer who qualifies for and participates in the JobKeeper Scheme.

The eligibility criteria in Victoria generally reflects the relevant provisions of the Code. Interestingly, under the Vic Act, the tenant must not only be an SME entity that qualifies for the JobKeeper Scheme, but it must also participate in the JobKeeper Scheme in order for the lease to be an 'eligible lease'.

The Vic Act and Vic Regulations contain two main carve outs to 'eligible leases'. These are detailed below.

Leases of a prescribed class

A lease or licence of premises which may be used wholly or predominantly for a specified list of farming and agricultural purposes will **not** be an 'eligible lease'.

Corporate tenants with an aggregated turnover in excess of $50 million

If the tenant meets one or more of the following criteria, the lease will **not** be an eligible lease:

1. the tenant is a member of a group of entities, by way of being connected with another entity or entities within the meaning of s 328-125 of the *Income Tax Assessment Act 1997* (Cth) (**Income Tax Act**) and the aggregate turnover of the group of entities exceeds $50 million in the most recent financial year; or
2. there is a relationship or connection between the tenant and another entity, in that they are affiliates or the tenant is an affiliate of the other entity or entities, within the meaning of s 328-330 of the Income Tax Act and the aggregate turnover of the tenant and the other entity or entities exceeds $50 million in the most recent financial year.

This provides useful clarification of the position under the Code and would also appear to narrow the group of leases that will constitute an 'eligible lease' for the purposes of the Vic Regulations.

The assessment that needs to be made to determine whether a corporate tenant is a member of a "prescribed group" or is an "affiliate" of another entity and whether that group or those affiliated entities have an annual turnover exceeding $50 million is substantially the same assessment that needs to be made when assessing the annual group turnover of an entity for the purpose of the JobKeeper Scheme.

The Vic Regulations define prescribed groups and prescribed relationships by reference to the Income Tax Act, the turnover of foreign entities (to the extent that they are part of the relevant group or affiliated with the tenant) will be included in the assessment of the $50 million threshold.

Given the grouping provisions, the ability of a landlord to verify the aggregate turnover of the tenant's group and affiliates will be limited without full co-operation from the tenant (i.e. providing a structure chart and relevant financial information) or an assessment by the ATO of eligibility. The inability for a landlord to verify this information is addressed to some extent by the requirement under the Vic Regulations for tenants requesting rent relief to provide the landlord with not only a statement confirming that the lease is not excluded from the operation of the Vic Regulations but the requirement that a tenant must provide evidence that it qualifies for and is a participant in the JobKeeper Scheme.

'Turnover' is defined broadly and is specified to mean:

1. the proceeds of sales of goods and/or services;
2. commission income;
3. repair and service income;
4. rent, leasing and hiring income;
5. government bounties and subsidies;
6. interest, royalties and dividends; and
7. other operating income,

earned or received by an entity in the most recent financial year.

Our reading of the Vic Regulations is that they requires the assessment of turnover to be made by reference to the 2019 FY.

Other means of 'control or influence'

The Vic Act also allows regulations to prescribe that a lease will not be an eligible lease where an entity has a prescribed method of control or influence, through the holding of a prescribed interest, right or power, in relation to acts or decisions relating to the ownership, management or affairs of a tenant under the retail lease or a non-retail commercial lease or licence that is a body corporate. This test is not linked to the turnover of the tenant or controlling entity and could potentially extend to a franchisor that has a level of control or influence over the franchisee. Despite the Vic Act allowing regulations to include a carve out to eligible leases on this basis, the Vic Regulations have not done so at this stage.

15.3 Adoption of leasing principles under the Code

The Vic Regulations generally reflect the Leasing Principles in the Code. We have provided further details on the main provisions of the Vic Regulations, and how they reflect, clarify or depart from the Code, below.

Breach of an eligible lease

Regulation 9(1) is narrower than Leasing Principle 1 of the Code, which prevents termination of leases for non-payment of rent during "the COVID-19 pandemic period (or a reasonable subsequent recovery period)". Under Regulation 9(1), a tenant is not in breach of an *eligible lease* for failing to pay rent only if:

1. the tenant has properly requested rent relief from the landlord, and complied with the tenant's obligations to negotiate the landlord's offer of rent relief in good faith but the rent relief has not yet been agreed between the landlord and tenant; or
2. the landlord and tenant have agreed to rent relief and the tenant has paid rent in accordance with that agreement.

Any request for rent relief by a tenant must be in writing and be accompanied by a statement that the lease is an eligible lease, and information evidencing that the tenant is an SME entity and qualifies for and is a participant in the JobKeeper Scheme (**Compliant Request**).

If either of those scenarios apply, Regulations 9 (2) to (4) prohibit a landlord under an eligible lease from:

1. evicting or attempting to evict a tenant;
2. re-entering or attempting to re-enter the premises; or
3. consistent with Leasing Principle 11 of the Code, having recourse against security provided.

A tenant will be in breach for failing to pay rent (and the landlord can take action, including by having recourse against any security provided under the eligible lease) if:

1. the tenant has not made a Compliant Request for rent relief and has not negotiated the landlord's offer in good faith; or
2. if the landlord and tenant have agreed to rent relief but the tenant is not paying rent in accordance with that agreement.

Consistent with the Code, there is no restriction on a landlord from taking action, including terminating an eligible lease or drawing down on a security under an eligible lease, for breaches of the eligible lease other than non-payment of rent.

Leasing Principle 2 of the Code, which provides that a material failure by a tenant to abide by substantive terms of a lease will forfeit any protection provided to the tenant under the Code, is not reflected in the Vic Regulations. In our view, the effect of this omission is that that a landlord retains all of its rights under the lease (including termination and having recourse to security) for any breach by a tenant of a lease whether or not it is a substantive term, other than non-payment of rent (**Other Material Breach**). However, if the tenant has otherwise made a Complaint Request, the occurrence of an Other Material Breach will not entitle the landlord to disregard Regulations 9 (2) to (4).

The Vic Regulations do not expressly deal with whether a landlord can have recourse against security in relation to a tenant's failure to pay rent prior to commencement of the Relevant Period. Our view is that, provided the tenant has made a Compliant Request and negotiated the landlord's offer in good faith in accordance with Regulations 10(1) to (5), the prohibition on recourse against security for non-payment of rent during the Relevant Period is broad enough to prohibit the recovery of arrears that are owing before the Relevant Period.

Prohibition on rent increases

Consistent with Leasing Principle 15 of the Code, the Vic Regulations prevent a landlord from increasing rent under an eligible lease during the Relevant Period. This does not apply to turnover rent. Unlike the Code, the landlord and tenant may agree that this regulation preventing rent increases does not apply.

Unlike the NSW Regulations, the Vic Regulations do not prohibit landlords from recovering rent increases from

tenants after the Relevant Period that would have been imposed during the Relevant Period if it were not for the application of the Vic Regulations. It is therefore open to landlords to recover lost rent increases (on rent paid during the Relevant Period) after the relevant period ends.

In our view, a landlord may:

1. still effect the rent increase, but will not be entitled to recover the increased rent during the relevant period; and
2. implement the rent increase immediately when the relevant period ends.

To satisfy the obligation to act in good faith, it would be prudent that any such entitlement should be clearly specified in any written agreement between the landlord and the tenant, particularly if the parties agree that lost rent payments are to be repaid after the Relevant Period.

Payment of deferred rent

Consistent with Leasing Principle 9 of the Code, if rent is deferred, the landlord must not request the payment of the deferred rent to commence until the earlier of:

1. the expiry of the Relevant Period (i.e., after 29 September 2020); and
2. expiry of the term of the eligible lease (disregarding any extension of the term provided for in the Vic Regulations).

The Code states that no payment of the deferred rent "should occur" until the earlier of these dates, but the Vic Regulations state that the landlord may "not request" payment. It is therefore open for tenants to commence paying earlier if they choose to do so.

Importantly, unlike the Code, the Vic Regulations provide that this regulation does not apply if the landlord and tenant agree otherwise.

Consistent with the Code unless otherwise agreed by the parties the deferred rent is amortised over the greater of:

1. the balance of the term of the eligible lease (as extended under the Vic Regulations); and
2. a period of no less than 24 months.

Unlike the Code, the Vic Regulations also state that the method of amortisation is to be agreed between the parties. The Code states that no "punitive interest", fee or charge may be charged for the repayment of a deferral of rent. However, Regulation 17 states that the landlord may not require a tenant to pay **any interest** fee or charge for a deferral.

Extension of term of eligible lease

The Vic Regulations differ to Leasing Principle 12 of the Code in the following two important respects:

1. the Code contemplates a tenant being provided an opportunity to extend its lease for an equivalent period to the rent waiver and/or deferral. However, Regulation 13 is limited an obligation on the landlord to offer the tenant an extension for the period of any agreed rent deferral; and
2. the offer to extend for the period of the deferral applies unless a landlord and tenant agree that this regulation does not apply to them.

The Vic Regulations clarify that the terms and conditions of the extended lease must be the same as the lease before commencement of the Vic Regulations.

Outgoings and expenses

Regulation 15 is broader than Leasing Principle 6 of the Code, which applies to statutory charges and insurances only. Specifically, under Regulation 15, if any outgoing charged or imposed on the landlord in relation to a premises is reduced, the landlord must pass on that reduction in the outgoing (on a proportionate basis) to the tenant. If the tenant has already paid the relevant outgoing (or the tenant's proportion of it) on the basis of the unreduced amount, the landlord must reimburse the tenant the excess amount paid by the tenant as soon as possible.

Consistent with Leasing Principle 8 of the Code, Regulation 14 provides that regardless of whether or not any outgoings charged or imposed on the landlord in relation to a premises is reduced, if a tenant under an eligible lease is not able to operate their business at the premises for any part of the Relevant Period, the landlord must consider waiving recovery of outgoings and other expenses for the period during which the tenant is not able to operate.

Unlike the Code which gives a landlord the right to reduce services as required, Regulation 14(3) entitles the landlord **to cease** or reduce the provision of services as is reasonable in the circumstances **and** in accordance with any reasonable request of the tenant.

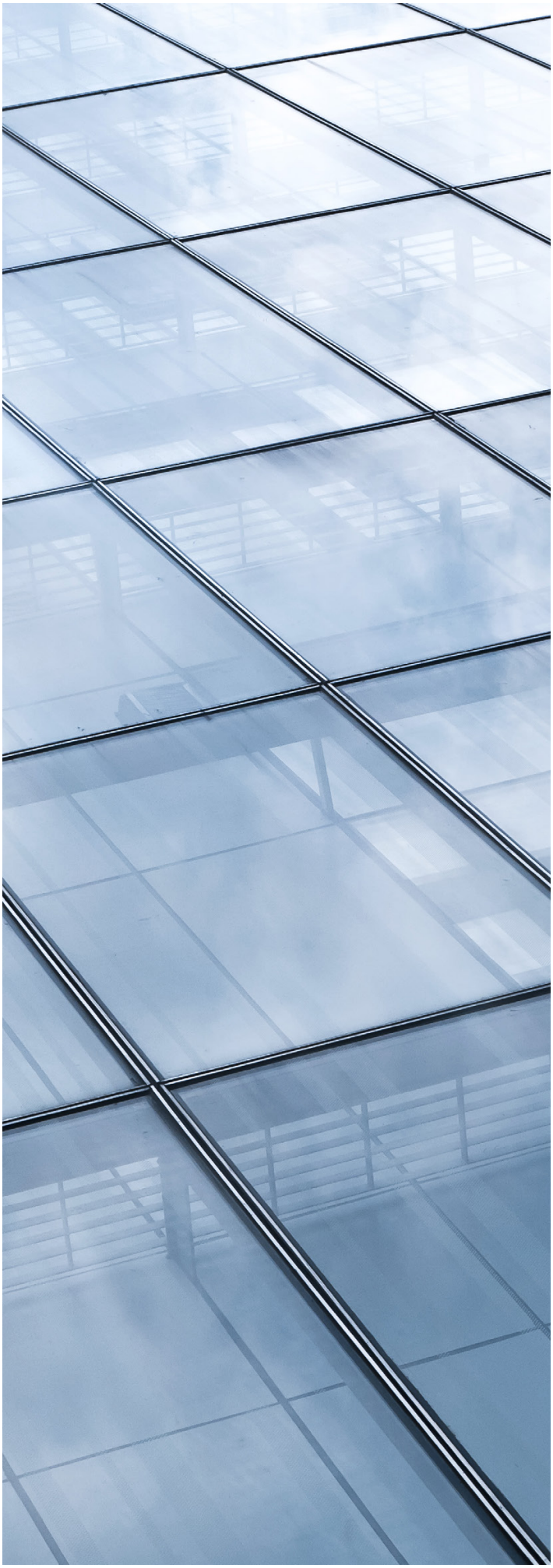
Change in trading hours

Regulation 18 provides that a tenant under an eligible lease is not in breach if during the Relevant Period it reduces the opening hours of the business or closes the premises and ceases to carry on business at the premises. If this occurs a landlord is prohibited from taking the usual courses of action i.e. evicting the tenant, re-entering and having recourse to the security.

Regulation 18 limits the operation of Leasing Principle 14 in that it only applies to reducing the hours of business or ceasing to trade during the Relevant Period. In our view, a landlord will have recourse if this practice continues on expiry of the Relevant Period.

Confidentiality

Unlike the Code, the Vic Regulations include specific provisions relating to confidentiality. A landlord and tenant are prohibited under an eligible lease from disclosing communications or information obtained in connection with the operation of the Vic Regulations except with consent, or



to a professional adviser or financier, or as authorised by the Small Business Commission or at law, or for the purpose of any proceeding in court or tribunal.

Regulation 24, however, allows a landlord under an eligible lease may give the statement required to be provided by a tenant as part of a Compliant Request, to the Commissioner for State Revenue for the purpose of applying for tax relief.

Other leasing arrangements

Unlike the Code the Vic Regulations do not include any motherhood statements requiring the spirt of the Vic Regulations to apply to all leasing arrangements for affected businesses. The Vic Regulations are specific as to what requirements must be met for each provision of the Vic Regulations to be operational.

Deemed inclusion of Vic Regulations in leases

A number of the Vic Regulations state that they are taken to form part of an eligible lease. This means that non-compliance will not only result in a breach of the statute but a breach of the lease giving the other party a contractual right for non-compliance.

Relevant Vic Regulations

The relevant Vic Regulations are as follows:

- Regulation 8 – landlords and tenants must work cooperatively;
- Regulation 12 (2) – prohibition on rent increases;
- Regulation 13 (2) – extension of term;
- Regulations 14(2) and 15(2) – recovery of outgoings or expenses and reduction in outgoings;
- Regulation 16 – payment of deferred rent;
- Regulation 17 (2) – no fees, interest or charges; and
- Regulation 19 – confidentiality.

15.4 Obligation to Negotiate

Good faith negotiations – not directly proportionate to turnover reduction

The Vic Regulations provide that a tenant under an eligible lease may request rent relief from the landlord provided it makes a Compliant Request. The requirement that tenants provide this information at the time rent relief is requested will reduce the administrative burden on landlords that are currently having to make a number of complicated assessments regarding a tenant's eligibility for relief.

If a tenant under an eligible lease makes a Compliant Request, the landlord must offer rent relief within 14 days after receiving the tenant's request. Unlike the Code, which requires rent relief offered to tenants to be directly proportionate to the reduction in the tenant's turnover, the Vic Regulations require a landlord's rent relief offer to be based on a much broader range of circumstances.

In particular, Regulation 10(4) requires the landlord's offer to be based on all the circumstances of the eligible lease and:

1. relate to up to 100% of the rent payable during the Relevant Period;
2. provide that no less than 50% of the rent relief is in the form of a waiver, unless the parties otherwise agree in writing;
3. apply to the Relevant Period; and
4. take into account:
   (a) the reduction in the tenant's turnover from the premises during the Relevant Period;
   (b) any waiver given by the landlord;
   (c) whether a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations under the lease;
   (d) a landlord's financial ability to offer rent relief, including any relief provided to a landlord by its lenders as a response to the COVID-19 pandemic; and
   (e) any reduction in outgoings charged or imposed on the premises.

This assessment represents an important difference to the Code including the relevance of the reduction in turnover and the recognition of the financial impact that rent relief has on the landlord.

Requirement to attempt negotiations

The landlord and tenant are expressly required under the Vic Regulations to negotiate in good faith the rent relief to apply during the Relevant Period.

Regulation 8(2) sets out the specific "good faith obligation":

> *A landlord and tenant under an eligible lease must cooperate and act reasonably and in good faith in all discussions and actions associated with matters to which these Regulations apply.*

The term good faith is not defined in the Code or the Vic Regulations, and has been the subject of much debate in the courts. In recent decisions the courts and academic commentators have held or opined that a duty of good faith encompasses the following obligations: to act honestly and with fidelity to the bargain, to communicate decisions, to co-operate, not to undermine the bargain or substance of the contractual benefit bargained for, to act reasonably and with fair dealing, not act arbitrarily or capriciously and to take into consideration the interest of the other party. Importantly, the duty does not limit the parties seeking to strike the best possible bargain in their own interest. Rather, the concept of good faith requires an honest and genuine attempt to resolve the differences by discussion and, if thought to be reasonable and appropriate, by compromise.

Whether the parties have acted in good faith will be dependent on the relevant circumstances of each matter under negotiation.

Re-negotiations if a tenant's financial circumstances materially change

The Vic Regulations allow a tenant (but not a landlord) to re-open negotiations if the tenant's financial circumstances materially change after an agreement or variation as to rent relief has been reached. The parties must then comply with the offer and negotiation process described above in relation to that subsequent request.

Importantly, while the Vic Regulations allow a tenant to re-open negotiations (presumably if the tenant's financial circumstances deteriorate), they do not expressly contemplate a landlord re-opening negotiations if a tenant's financial circumstances improve. Whether or not a landlord can initiate negotiations regarding changes to rent relief being offered is therefore unclear. However it is worth noting that Regulation 11 (2) provides that a landlord's subsequent offer of rent relief (i.e. an offer made in response to a change in the tenant's financial circumstances) does not need to comply with the requirement for at least 50% of the rent relief to be provided in the form of a rent waiver.

15.5 Dispute resolution

We have set out detailed commentary on the compulsory mediation process at Section 5. The Small Business Commission must certify in writing that mediation has failed, or is unlikely to resolve the dispute, before a party can commence proceedings in VCAT or a court in relation to the dispute (unless leave is granted for proceedings in the Supreme Court).

The Vic Regulations provide that VCAT must take into account in making an order:

1. the reduction in a tenant's turnover associated with the premises during the Relevant Period;
2. any waiver of recovery of outgoings and other expenses payable by the tenant;
3. whether a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations under the eligible lease, including the payment of rent;
4. a landlord's financial ability to offer rent relief, including any relief provided to a landlord by any of its lenders as a response to the COVID-19 pandemic;
5. any reduction to any outgoings charged, imposed or levied in relation to the premises; and
6. the certificate issued by the Small Business Commission that mediation has failed or is unlikely to resolve the dispute.

16 Western Australia

On 24 April 2020, the Western Australian Government introduced the *Commercial Tenancies (COVID-19 Response) Act 2020* (**WA Act**) to legislate a range of measures for urgent relief for commercial tenants in response to the COVID-19 pandemic. On 30 May 2020 the *Commercial Tenancies (COVID-19 Response) Regulations 2020* containing, at Schedule 1, a Code of Conduct (**WA Code**) came into force.

16.1 Eligibility

The WA Act applies to small commercial leases, which is defined as either a retail shop lease (as that term is defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) (**RSA**)), a lease where the tenant is a small business (as that term is defined in the *Small Business Development Corporation Act 1983* (WA), a lease where the tenant is an incorporated association or any other lease that is prescribed by regulations. Based on this test, the application of the Act is quite broad.

However, the WA Code only applies to *relevant* small commercial leases, which is a new concept that narrows the eligibility test from the WA Act, but is similar to the SME tenants test set out in the Code.

A *relevant* small commercial lease under the WA Code is a small commercial lease (as defined in the WA Act) where the tenant is an *eligible tenant*. This term is introduced by the WA Code and applies to a tenant:

1. whose turnover in the financial year ending 30 June 2019 was less than $50 million:
   (a) if the tenant is a franchisee, for the business conducted by the tenant at the land or the premises that are the subject of the small commercial lease;
   (b) if the tenant is a corporation that is a member of a group, for the group;
   (c) in any other case, for the business conducted by the tenant at the land or premises that are the subject of the small commercial lease; and
2. the tenant:
   (a) qualifies for the JobKeeper Scheme under the JobKeeper Rules section 7; or
   (b) has at any time during the emergency period satisfied the decline in GST turnover tests set out in section 8 of those Rules.

The eligibility test in the WA Code, while similar to the SME test in the Code, is less stringent as the second limb of the test is satisfied if the tenant qualifies for the JobKeeper Scheme **or** at any time satisfies the decline in turnover test set out in the Rules.

16.2 Adoption of leasing principles

The WA Act introduces moratoriums on landlords evicting tenants, terminating leases, increasing rent, calling on a tenant's security and charging interest on waived or deferred rent during the emergency period (30 March 2020 to 29 September 2020 or a day prescribed by regulation). While the WA Act initially neglects to address a number of the Leasing Principles in the Code, the WA Code fills in many of the gaps and together the documents reasonably reflect the Code. However, one limitation of both the WA Act and the WA Code is that there is no provision in line with Leasing Principle 2 of the Code. Therefore, in Western Australia, a tenant can enjoy the protections of the WA Act and WA Code even if the tenant fails to commit to abide by the substantive terms of its lease.

Overarching obligations

The WA Code addresses the principles in the Code in relation to rent reductions, waivers and deferrals and general overarching principles regarding the parties' conduct in respect of those negotiations.

Specifically, landlords and tenants, in undertaking negotiations for the purpose of the WA Code must:

1. co-operate;
2. act reasonably and in good faith;
3. act in an open, honest and transparent manner;
4. provide each other with sufficient and accurate information that is reasonable for them to provide in the circumstances for the purposes of the negotiations; and
5. not make onerous demands for information from each other.

While these reflect, for the most part, the overarching principles of the Code, there is no requirement for parties to assist each other in their dealings with stakeholders such as banks to achieve outcomes consistent with the objectives of the WA Code. There is also no positive obligation on the landlord to not seek to permanently mitigate the risk of default in negotiating a temporary pandemic relief arrangement provided for by the WA Act and WA Code.

Rent relief

Under the WA Code, an eligible tenant under a small commercial lease may request rent relief from its landlord during the emergency period by submitting a written request to its landlord together with sufficient and accurate information evidencing:

1. that the tenant is an eligible tenant; and
2. the tenant's reduction in turnover.

Upon receipt of the tenant's request and given all the required information is provided, a landlord must offer the tenant rent relief within 14 days unless the parties agree to extend that time period.

Any offer of rent relief, and the subsequent negotiations in relation to that rent relief, must comply with the principles

set out in clause 7 of the WA Code. Clause 7 reflects Leasing Principle 3, which requires landlords to offer rent reductions proportionate to their loss of trade.

Clause 7 of the WA Code provides that:

1. the offer of rent relief must apply to the emergency period;
2. the rent relief may be up to 100% of the rent payable by the tenant but must be at least proportionate to the reduction in the tenant's turnover during the emergency period; and
3. unless otherwise agreed by the parties:
   (a) the reduction in the tenant's turnover is to be calculated using the principles of the decline in turnover test set out in section 8 of the JobKeeper Rules (modified as required to reflect the principle of proportionality); and
   (b) the offer of rent relief must provide that not less than 50% of the rent relief is in the form of a waiver of rent.

A landlord may offer more than 50% of the rent relief in the form of a waiver if the landlord has the financial capacity to do so and if failure to provide more than 50% of the rent relief as a waiver would compromise the tenant's capacity to fulfil its obligations under its lease.

Clause 7 operates as a waiver of rent and therefore, applying ordinary property law principles, that waiver is a waiver of the landlord's right to take action for a breach of the rent condition of the original lease. Clause 73 of the Property Law Act 1969 (WA) states that any waiver of a condition will specifically apply only to that condition, which effectively maintains the landlord's rights in respect to other breaches of the lease by the tenant during the pandemic period. However, any action that the landlord could ordinarily take for other breaches of the lease (particularly money and trade related breaches) is substantially restricted by the prohibitions in the WA Act.

Payment of deferred rent

Where the parties agree to defer the payment of rent, clause 9 of the WA Code provides, among other things, that:

1. the landlord must not request payment of any part of the deferred rent until the earlier of the expiry of the emergency period or the expiry of the term of the lease (before any extension of the term negotiated as part of the rent relief); and
2. the payment must be amortised over the balance of the term of the lease or a period of at least 2 years.

In keeping with Leasing Principle 5, clause 9 of the WA Code also provides that a landlord and tenant may agree an alternative arrangement for the repayment of deferred rent, in which case the restriction on requesting repayment and minimum time period to amortise the repayment of the deferred rent under the WA Code do not apply.

Extensions

Leasing Principle 12 is also captured by the WA Code, with extensions to be offered on the same terms and conditions that applied under the small commercial lease before the emergency period, unless inconsistent with a head lease. The extension must be for a term equivalent to the period during which rent is deferred.

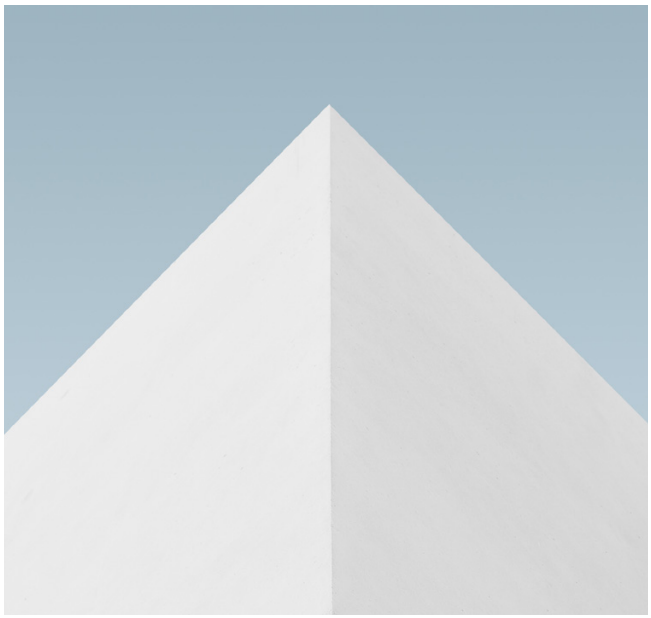
For retail shop leases which fall within the RSA, the tenant is entitled to a minimum 5 year lease. If a retail lease (including any option terms) is for less than 5 years then it is deemed to have an option to renew such that the tenant is entitled, in total, to a lease of the premises for 5 years. It is likely that the extension period required under Leasing Principle 12 would be in addition to the statutory right to a 5 year lease term.

Outgoings

The WA Code requires landlords to consider waiving recovery of any outgoings or other expenses payable by the tenant if the tenant is unable to conduct its business from the premises. The relevant clause of the WA Code also requires landlords to consider such an arrangement, but does not contain a positive obligation on the tenant to enter into such an arrangement.

In line with Leasing Principle 6, any reductions in outgoings, including rates and taxes, must also be passed on to eligible tenants and, if an eligible tenant has paid any outgoings greater than the tenant's share, the landlord must reimburse the excess amount as soon as possible.

If the lease is a retail lease that falls within the RSA and the landlord reduces services to the centre, it will need to have regard to the impact this may have on tenants and the landlord's liability, as the landlord is liable under section 14 of the RSA to pay compensation where they inhibit access to the shop in a way which causes loss of profits to the tenant.



Gaps

While the WA Code provides some much needed (and overdue) certainty for commercial tenants and landlords in WA in relation to the process for negotiating rent reductions, it essentially mirrors the provisions in the Code and fails to address some of the deficiencies in the Code and the WA Act.

The WA Act and WA Code both fail to address the requirement under Leasing Principle 2 of the Code that a tenant remain committed to the terms of its lease and therefore fail to consider whether a tenant failing to abide by the terms of its lease might result in a tenant forfeiting the protections under the WA Code.

The WA Act and WA Code are silent on whether landlords are able to take action for non-payment or rent breaches that arose prior to the pandemic period. It is unclear what action (if any) a landlord can take in respect of non-payment of rent during the pandemic period after the prohibition is lifted. The Code, WA Act and WA Code are all also silent on who is to bear the costs of any variation of lease (e.g. as a result of the parties' rent relief arrangements). In the circumstances it is unlikely that a landlord will be able to recover any such costs.

16.3 Dispute resolution

The WA Act prescribes a process for parties to seek the assistance of the Small Business Commissioner (SBC) or State Administrative Tribunal (SAT) to resolve disputes arising out of or in relation to:

- the application of the WA Code; and
- financial hardship disputes.

In WA, the SAT has the capacity to order mediation as part of its programming orders and we expect that the vast majority of disputes will be dealt with in this way.

The dispute resolution process may be used where the parties dispute the application of the WA Code to a lease (including the waiver or deferral of rent payable under the lease). The WA Code does not provide any further guidance on how parties may use the dispute resolution process to resolve a dispute during the pandemic period.

The concept of a financial hardship dispute was incorporated in the WA Act by amendment to provide checks and balances on tenants. A financial hardship dispute is defined as a dispute that arises because a tenant has breached a small commercial lease by failing to pay rent or any other amount payable under the lease (that was not money the subject of a rent deferral or waiver) and the landlord claims that the breach was not a result of the tenant suffering financial hardship due to COVID-19.

If a financial hardship dispute arises, the landlord can commence proceedings in the SAT. The onus of proof rests with the landlord however SAT is empowered to order the production of documents to verify a tenant's finances. If a tenant has failed to pay rent and it has not suffered financial hardship the SAT can order the termination of the lease.

16.4 Additional prohibitions

In our view the WA Act goes further than the Code in that in addition to the prohibitions in the Code the WA Act also prohibits any action to:

- distrain goods;
- bring a claim for damages; or
- seek any other remedy otherwise available to a landlord against a tenant at common law or under a written law.

The WA Act effectively prevents a landlord from taking any enforcement action under a lease during the 'emergency period'.

16.5 Early Termination Bill

The *Commercial Tenancies (COVID-19 Response (Early Termination)) Bill 2020* (WA) (**Early Termination Bill**) was also introduced to the Western Australian Parliament.

However the Attorney General stated in the second reading speech that the Government does not intend to list the second reading debate of the Early Termination Bill and will only do so if there is evidence of widespread failure by landlords to negotiate in good faith for rent relief for commercial tenants.

Effectively, the Early Termination Bill allows a tenant to give a landlord notice if during the emergency period:

- the tenant claims to have suffered financial hardship;
- the landlord and tenant have made reasonable endeavours to negotiate waivers and deferrals of rent; and
- despite those endeavours the tenant is not or will not be able to perform its obligations under the lease.

The landlord then has 14 days to either accept the termination or apply to SAT to have the matter determined. If the Landlord accepts the termination or does not give notice in time the lease terminates 21 days after the tenant's initial notice was given.

Given the Government's position in relation to the Early Termination Bill it may never be enlivened.

Other relevant considerations

17 What are the direct and indirect tax considerations?

17.1 Duty

Generally amendments should not have any duty implications since there is no lease duty (but there could be duty implications if there is payment for surrender or payment of a premium).

Surrenders (although not contemplated by the guidelines) may have duty implications if a payment is made. For example, in Queensland a payment by the tenant is subject to transfer duty.

17.2 GST

Introduction

Amendments should not have any material GST consequences (although some amendments which relate to past rent periods may require landlords to issue adjustment notes). Any adjustment to rent will require an adjustment note. For attribution taxpayers the GST liability and entitlement to input tax credit will arise on the earlier of the issue of the tax invoice or receipt of part of the consideration. For periods where rent has been invoiced but not paid the adjustment note should be issued to reverse the GST liability/credit.

If there is any consideration for a lease extension or surrender, then GST will be imposed on the actual consideration. Surrenders (although not contemplated by the guidelines) may have GST implications if a payment is made (e.g. we assume it could be a taxable supply).

There are a number of specific CGT events relating to leases. A grant, variation to, surrender or extension of a lease will be a CGT event (CGT Event F1, F2, F3, F4) but the capital proceeds will be the amount paid or payable and the cost base will be the expenditure incurred.

In relation to lease incentives by landlords (i.e. fitout rather than rent holiday), any incentives proposed by landlords will require specific advice. For example, a fit out contribution can be assessable to the tenant if not structured correctly – similar to a cash lease incentive.

GST consequences of the Code

The implementation of the Code as between landlords and tenants under commercial leases will have consequences for landlords on how they manage their GST obligations. While GST law operates to ensure that the landlords should not be liable for GST on rental amounts that it cannot recover from tenants, landlords should consider their commercial position carefully to determine how any timing differences in a GST liability arising and their legal ability to recover the entirety of the rental amount due.

GST attribution and commercial leasing

The GST on a taxable supply of commercial property made by a landlord is one-eleventh of the consideration for that supply. Where that supply is made under a lease, each progressive or periodic component of the supply is treated a separate supply. For example, a five year lease with monthly rental payments will be treated as a series of 60 separate monthly supplies for GST purposes. The GST liability for each component (being the relevant month) is determined in the same manner under the general rules as if each month there was a separate supply of the premises.

Most commercial landlords will have a GST turnover exceeding $2 million per annum and are required to report GST on an accruals basis. The liability to GST on periodic supplies made under a lease is attributed to the tax period in which they issue an invoice or receive any part of the consideration for a particular periodic supply (whichever occurs first).

For the lease in the above example, this means that GST is attributable at the earliest of:

- the issue of an invoice for a monthly rental period; or
- the receipt of any of the consideration actually provided for the rental period (and not the total consideration provided under the five year lease).

It should be noted that an invoice for attribution purposes is not the same a tax invoice. As noted in paragraph 56 of GSTR 2000/34:

> *An invoice notifies a recipient of an obligation to pay. The effect of an invoice is to allow you to attribute the GST payable and input tax credits to the correct tax period. A tax invoice will enable you to claim input tax credits on your GST return. You cannot claim an input tax credit unless you hold a tax invoice.*

Under the same ruling, the Commissioner make clear that a lease instrument is not an invoice for the entirety of the lease and, to the extent it can be treated as an invoice, it is only an invoice for the first rental period of the lease.

Consistent with the Commissioner's view above, the administrative concession in GSTR 20013/1 to allow certain lease instruments to be treated as a tax invoice, this concession applies only for tenants claiming input credits and does not make the lease (or any periodic part of it other than the first month of the lease) an invoice for attribution purposes.

GST where there is a difference between rent due and rent received

In the ordinary course of leasing practice, differences may arise between the rental amount due each month and the rental amount collected.

Where there is no invoice issued and no rental payment of any amount made by the tenant, the landlord would not have any GST attributed to that tax period for that tenancy. Where an invoice has been issued or part of the rental payment received only, GST is chargeable on the rental amount invoiced or otherwise due. In other words, GST is not attributed based on one-eleventh of the rental amount collected, but rather one-eleventh of the rental amount invoiced or due. The landlord may subsequently recover any arrears in later tax periods without any further liability to GST on those amounts.

In such case, the landlord may be commercially required to use its own funds to cover any shortfall between the amount recovered from the tenant and the amount due to the Commissioner until such time that full recovery is made.

In the event the landlord does not recover the full amount of rental from the tenant, it may have a decreasing adjustment that will reduce its net GST liability for a subsequent tax period by an amount equal to the GST on the arrears amount that is not recovered, either as an adjustment or under the bad debt provisions. This ensures that the landlord's GST liability is ultimately adjusted to reflect the amount recovered. However, the landlord may be required to fund the shortfall until it receives the benefit of the decreasing adjustment.

GST and the Code

The GST consequences of compliance with the code of conduct will generally follow the legal manner in which the parties to a commercial lease record their agreement. For example:

1. A deferral of a rental amount due (whether formally or informally) nonetheless results in the landlord having GST attributed on the full amount of GST due. While there is potentially a GST funding issue for the landlord, this may have some commercial advantages for the landlord. For example, it creates a debt owing to the landlord that could be recovered in full at a later time if trading conditions improve, or otherwise crystallise a pre-administration liability in the event that the tenant is unable to trade through the downturn successfully. In the event the debt due is written off, the landlord may have the benefit of a decreasing adjustment at that time that will provide them with a GST credit equal to the GST previously attributed.
2. A waiver or discount of rental may give rise to an adjustment event at the time it occurs. This may reduce any shortfall in funding the liability to GST attributed to a tax period where the waiver is made in that same tax period. The landlord must issue an adjustment note within the same tax period for this to occur. Commercially, this may provide some flexibility for the landlord as to what amounts it may wish to waive and what amounts it may wish to recover as debts owing at a later time.
3. An amendment to the lease to reduce the rent should result in the GST liability reflecting the GST amount recoverable from the tenant provided that the tenant is able to pay the reduced amount in full. If this is not the case, the potentially funding shortfall issue still arises. Commercially, this may give less flexibility to a landlord to subsequently benefit from an increase of the tenant to meet the original rental if trading conditions improve.
4. In circumstances where the landlord has a legally enforceable right to recover an amount (e.g. under a lease) but is prevented from enforcing that right by the code of conduct, the applicable GST result has some ambiguity. For example, it is possible that this may mean the amount is not due and does not require attribution, or alternatively that it does require attribution because there is a legally enforceable right under the lease (but for the Code). In the event attribution was required, it would appear consistent with the framework of the GST law for the bad debt provisions to apply to treat that amount an unrecoverable amount at the time is may become due under the lease (netting off the attribution amount). Alternatively, it may constitute an adjustment event with the same effect. A formal waiver by the landlord of an amount unrecoverable under the Code may strengthen the position that an adjustment event occurs by making it abundantly clear that the amount is no longer due. In such case, an appropriately timed waiver may reduce the possibility for any GST shortfall on amounts that cannot be recovered under the Code.

18 What are the FIRB implications?

Leasing Principle 12 of the Code provides that the tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period to provide the tenant with additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic concludes.

If the tenant is a 'foreign person' for the purpose of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) regard will need to be had as to whether, at the time the extension is granted, it is reasonably likely that the term of the lease (including extensions) will exceed five years as the threshold for such 'acquisitions' is now zero.

On Friday 24 April, *Treasury released Guidance Note 53 Temporary Measures in Response to Coronavirus* which provided clarification on the application of zero threshold to leases – see Guidance Note 53.

Under the Guidance Note, where the term of an existing lease is extended or where there is a surrender and re-grant of a lease as a result of variations to that lease, then the term of the lease will be assessed by reference to the time remaining on the lease and the extension. So for example, if a foreign tenant has four years remaining on its lease and the parties agree to extend the lease by two years, foreign investment approval will be required for the extension.

The changes to the foreign investment regime announced on 29 March 2020 at the same time also increased the approval timing to six months.

The result of the existing foreign investment requirements is that there are essentially two solutions open to landlords and tenants to ensure they are not in breach of the foreign investment regime (including being knowingly concerned in a contravention of the regime):

- all variations to the lease are made conditional on foreign investment approval; or
- all variations to the lease, other than the extension of the term, commence immediately, but with the extension of the term being conditional on foreign investment approval.

Clearly option two means the landlord is placed in the position of accepting all regulatory risk and if foreign investment approval is not obtained (including because a tenant does not diligently pursue obtaining approval). Option two is also not in the interests of tenants, having regard to the objectives stated in Leasing Principle 12.

Appropriate warranties (and associated indemnities) should be obtained from tenants in this regard and should be included in any lease extension deeds entered into.

Contacts

Peter Calov
Partner, Sydney

+61 2 9210 6215
+61 412 397 660
peter.calov@corrs.com.au

Alexandra Peace
Partner, Melbourne

+61 3 9672 3179
+61 455 429 474
alexandra.peace@corrs.com.au

Nathaniel Popelianski
Partner, Melbourne

+61 3 9672 3435
+61 407 092 567
nathaniel.popelianski@corrs.com.au

Andrew Leadston
Partner, Sydney

+61 2 9210 6114
+61 403 862 799
andrew.leadston@corrs.com.au

Paul Carrick
Partner, Sydney

+61 2 9210 6353
+61 413 002 390
paul.carrick@corrs.com.au

Christine Covington
Partner, Sydney

+61 2 9210 6428
+61 419 607 812
christine.covington@corrs.com.au

Alan Churley
Partner, Perth

+61 8 9460 1660
+61 438 520 620
alan.churley@corrs.com.au

Daryl Clifford
Partner, Brisbane

+61 7 3228 9778
+61 417 761 559
daryl.clifford@corrs.com.au

Lizzie Knight
Partner, Sydney

+61 2 9210 6437
+61 402 793 072
lizzie.knight@corrs.com.au

David Ellenby
Partner, Melbourne

+61 3 9672 3498
+61 401 030 979
david.ellenby@corrs.com.au

Natalie Bryant
Partner, Sydney

+61 2 9210 6227
+61 402 142 409
natalie.bryant@corrs.com.au

Greg Hassall
Partner, Brisbane

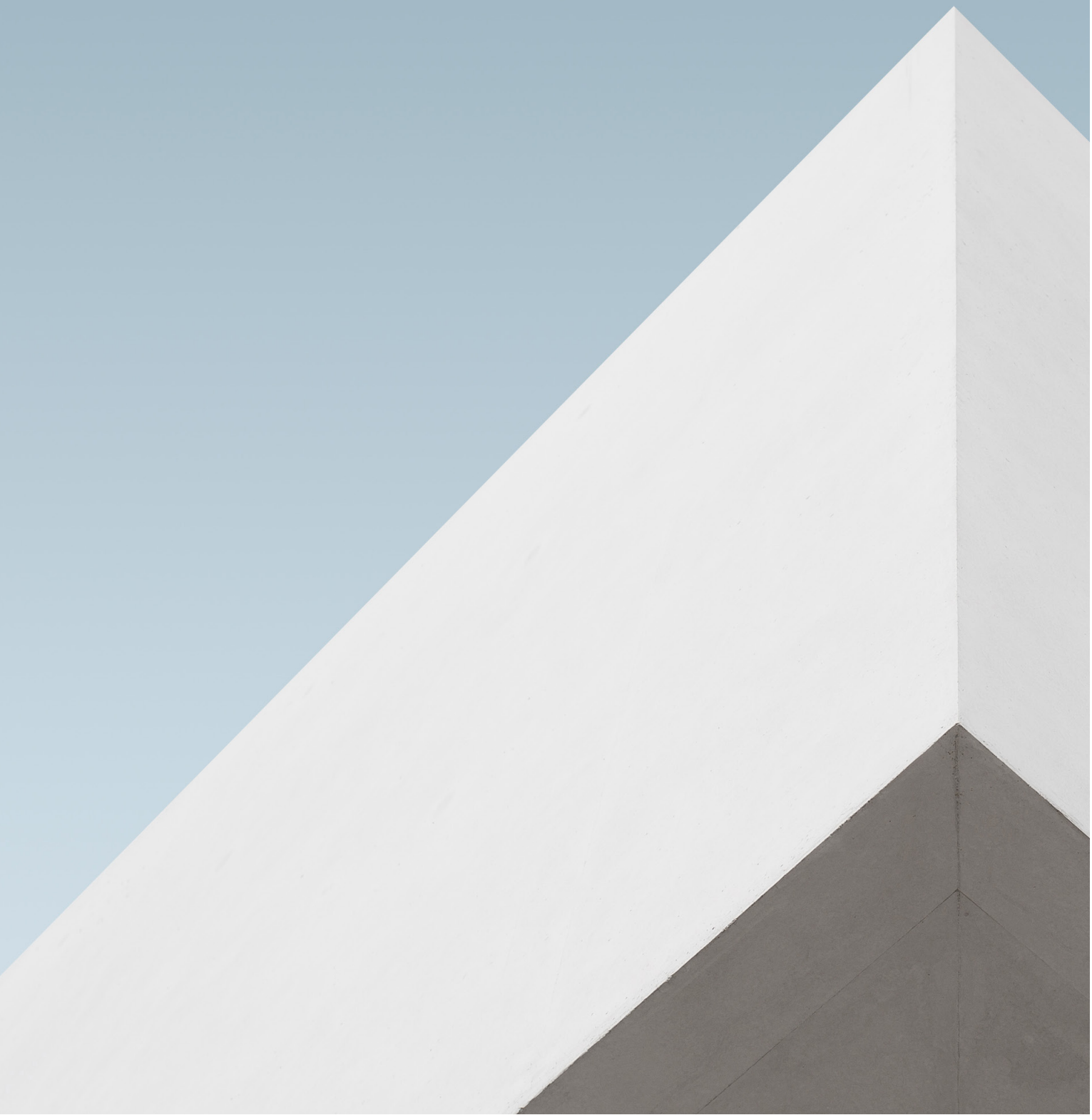
+61 7 3228 9359
+61 417 771 398
greg.hassall@corrs.com.au

Rebecca Field
Partner, Perth

+61 8 9460 1628
+61 427 411 567
rebecca.field@corrs.com.au

Annexures

Annexure 1: 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
  - i.e. 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.

Annexure 2: Summary of national changes to commercial tenancy arrangements

COVID-19 | National changes to commercial tenancies arrangements					
	Code	NSW	Queensland	Victoria	Western Australia
Enabling Legislation	National Cabinet Mandatory Code of Conduct	*COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW)	*COVID-19 Emergency Response Act 2020* (Qld)	*COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic)	*Commercial Tenancies (COVID-19 Response) Act 2020* (WA) (WA Act))
Regulation		*Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) (**NSW Regulations**) Including: 1. regulations made under the *Retail Leases Act 1994* (NSW) (**NSW Retail Regulation**); and 2. regulations made under the *Conveyancing Act 1919* (NSW), which are now inserted as a new Schedule 5 of the *Conveyancing (General) Regulation 2018* (NSW) (**NSW Conveyancing Regulation**)	*Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (Qld) (**Qld Regulation**)	*COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic) (**Vic Regulations**)	*Commercial Tenancies (COVID-19 Response) Regulations 2020* (WA) (**WA Regulations**)
Commencement of Scheme		24 April 2020	The response period commenced on 29 March 2020 (Retrospective operation) The Qld Regulation commenced on 28 May 2020	29 March 2020 (Retrospective operation)	30 March 2020 (Retrospective operation) The WA Regulations commenced on 30 May 2020
End Date of Scheme		24 October 2020	The response period expires on 30 September 2020 The Qld Regulation expires on 31 December 2020	29 September 2020	29 September 2020 or a day prescribed by regulation.

COVID-19 | National changes to commercial tenancies arrangements

	Code	NSW	Queensland	Victoria	Western Australia
What leases are included?	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 Scheme. These principles will apply to negotiating amendments in good faith to existing leasing arrangements.	**The NSW Regulations apply to 'commercial leases' which include:** 1. under the NSW Retail Regulation, retail shop leases under the *Retail Leases Act 1994* (NSW); and 2. under the NSW Conveyancing Regulation, any agreement to which the *Conveyancing Act 1919* (NSW) applies relating to the leasing of premises or land for commercial purposes. The NSW Regulations exclude the following leasing arrangements: 1. Leases entered into after the commencement of the NSW Regulations (not including leases entered into via options to extend or renew, or any other extension or renewal of an existing lease on the same terms); 2. Leases under the Agricultural Tenancies Act 1990. As the definition is broad, some licences and unregistered agreements for lease may be included in the operation of the NSW Regulations.	**The Qld Regulation applies to 'affected leases', which is a lease of premises if:** 1. the lease is: a. a retail shop lease (as defined in the *Retail Shop Leases Act 1994* (Qld)); or b. a prescribed lease (a lease for premises used wholly or predominantly for carrying on a business); 2. as at 28 May 2020, the lease (or an agreement to enter the lease), is binding on the tenant (whether or not the lease has commenced); 3. the tenant is an SME entity (defined in the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cth) – subject to section 5(3) of the Qld Regulation); and 4. the tenant, or an entity connected with, or an affiliate of, the tenant responsible for, or involved in, employing staff for the business carried on at the premises, is eligible for the JobKeeper scheme. If the tenant under an affected lease is a franchisee, a lease under which the franchisor is tenant of the premises occupied by the franchisee is also an affected lease.	**The Vic Regulations apply to 'eligible leases' which include:** 1. a retail lease as defined in the *Retail Leases Act 2003* (Vic); or 2. a non-retail commercial lease or licence, being: a. a non-retail lease of premises where premises are let for sole or predominant purpose of carrying on a business at the premises; or b. a commercial licence, sub-licence or agreement for a licence or sub-licence, under which a person has the right to non-exclusively occupy a part of the premises for the sole or predominant purpose of carrying on a business at the occupied premises (licence need not be in writing, can be express or implied); and 3. a lease in effect on 29 March 2020. The Vic Regulations exclude a lease or licence of premises which may be used wholly or predominantly for a specified list of farming and agricultural purposes.	**The WA Act applies to 'small commercial leases' which include:** 1. any retail shop lease as defined in the Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) (WA Retail Shops Act); 2. any lease, sub-lease, licence or other agreement under which a person grants a right to another person to occupy land or premises whether orally or in writing where the tenant: a. is an incorporated associate; or b. owns or operates a small business and uses the land or premises that are the subject of the lease for the carrying on of that business; or 3. any lease of a class prescribed by regulations. A 'small business' is defined in the *Small Business Development Corporation Act 1983* (WA) (**Small Business Act WA**) as a business which is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the *Corporations Act 2001* of the Commonwealth and which: 1. has a relatively small share of the market in which it competes; and 2. is managed personally by the owner or owners or directors, as the case requires; and 3. is not a subsidiary of, or does not form part of, a larger business or enterprise.

COVID-19 | National changes to commercial tenancies arrangements

	Code	NSW	Queensland	Victoria	Western Australia
What leases are included? *continued*			The following are not affected leases: 1. a lease under which the premises are to be used wholly or predominantly for a farming business under the Farm Business Debt Mediation Act 2017 (Qld); or 2. a lease, permit, licence or sublease under the Land Act 1994 (Qld), unless: a. it is a sublease of premises under a lease that has a rental category of 13 or 16 under that Act; and b. the sub-tenant is not a government leasing entity within the meaning of the Land Regulation 2009 (Qld), section 30(3).		

COVID-19 | National changes to commercial tenancies arrangements

	Code	NSW	Queensland	Victoria	Western Australia
Who is an eligible tenant?	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 Scheme, with an annual turnover of up to $50 million ("SME tenants").	**A tenant will be an impacted tenant under the NSW Regulation if:** 1. The tenant 'qualifies' for the Federal JobKeeper Scheme; and 2. The tenant's turnover in the 2018 – 2019 financial year was less than $50 million: a. **Franchisee** – if the tenant is a franchisee, the turnover of the business conducted at the premises; b. **Corporation** - If the tenant is a corporation that is a member of a group (being a related body corporate within the meaning of the Corporations Act 2001 (Cth)) – the turnover of the group; c. **In any other case** – the turnover of the business conducted by the tenant. **Corporations – members of groups** Under the Corporations Act, corporations are related (and therefore members of a group) if any of the following apply: 1. one body corporate controls the board composition of another body corporate; 2. one body corporate can control more than 50% of votes in a general meeting of another body corporate; or 3. one body corporate holds more than 50% of the share capital of another body corporate. The assessment of whether an overseas entity is a party to a group requires detailed analysis to establish if the overseas entity is a related body corporate.	The Qld Regulation applies to 'affected leases'.	**A tenant will be a party to an eligible lease if, on or after 29 March 2020:** 1. the tenant is an SME entity; and 2. the tenant qualifies for and participates in the JobKeeper Scheme. **SME entity** – defined in *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cth), entity where the annual turnover for the current year is likely to be (or the annual turnover for the previous year was) less than $50 million. **A tenant will not be party to an eligible lease if:** 1. the tenant is a member of a group of entities, by way of being connected with another entity or entities within the meaning of s 328-125 of the *Income Tax Assessment Act 1997* (Cth) (**Income Tax Act**) and the aggregate turnover of the group of entities exceeds $50 million in the most recent financial year; or 2. there is a relationship or connection between the tenant and another entity, in that they are affiliates or the tenant is an affiliate of the other entity or entities, within the meaning of s 328-330 of the Income Tax Act and the aggregate turnover of the tenant and the other entity or entities exceeds $50 million in the most recent financial year.	**A tenant under a small commercial lease is an eligible tenant if:** 1. the tenant's turnover in the 2018-19 financial year was less than $50 million: a. **Franchisee** – if the tenant is a franchisee, the turnover of the business conducted at the premises; b. **Corporation** – if the tenant is a corporation that is a member of a group (being a related body corporate within the meaning of the *Corporations Act 2001* (Cth), the turnover of the group; 2. **In any other case** – the turnover of the business conducted by the tenant at the premises; andthe tenant: a. qualifies for the JobKeeper Scheme; or b. has, at any time during the emergency period, satisfied the decline in turnover test set out in section 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth).

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	Code	NSW	Queensland	Victoria	Western Australia
Who is an eligible tenant? *continued*					**Corporations – members of groups** Under the Corporations Act, corporations are related (and therefore members of a group) if any of the following apply: 1. one body corporate controls the board composition of another body corporate; 2. one body corporate can control more than 50% of votes in a general meeting of another body corporate; or 3. one body corporate holds more than 50% of the share capital of another body corporate. The assessment of whether an overseas entity is a party to a group requires detailed analysis to establish if the overseas entity is a related body corporate.
Turnover/ revenue test		$50 million threshold as above and includes online sales.	To constitute an affected lease, the tenant must constitute an SME entity and be eligible for the JobKeeper scheme. For the purposes of determining whether a tenant is an SME entity, the tenant's annual turnover is: 1. if the tenant is an entity connected with, or an affiliate of, another entity – the aggregate annual turnover of the entities; or 2. otherwise, the annual turnover of the business carried on by the tenant at the premises.	"Annual turnover" the total of the following that is earned in the year in the course of the business: 1. the proceeds of sales of goods and/or services; 2. commission income; 3. repair and service income; 4. rent, leasing and hiring income; 5. government bounties and subsidies; 6. interest, royalties and dividends; and 7. other operating income.	Rent relief offered by a landlord must be at least proportional to the reduction in the tenant's turnover experienced during the emergency period under the small commercial lease. Unless otherwise agreed by the landlord and tenant, the reduction in the tenant's turnover is to be calculated using the principles of the decline in turnover test set out in the section 8 of the Coronavirus *Economic Response Package (Payments and Benefits) Rules 2020* (Cth) amended as appropriate to reflect the principles in the above paragraph.

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Prohibited Actions	**Principle 1:** Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period). **Principle 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.	A 'prescribed action' is defined to mean taking action or seeking orders or issuing proceedings in a court or tribunal for the following: 1. eviction of the tenant from premises or land; 2. exercising a right of re-entry to premises or land; 3. recovery of the premises or land; 4. distraint of goods; 5. forfeiture; 6. damages; 7. requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a tenant; 8. recovery of the whole or part of a security bond under the commercial lease; 9. performance of obligations by the tenant or any other person pursuant to a guarantee under the commercial lease; 10. possession; 11. termination of the commercial lease; or 12. any other remedy otherwise available to a landlord against a tenant at common law or under the law of New South Wales.	A 'prescribed action' is an action under a lease or the starting of a proceeding in a court or tribunal, for any of the following: 1. recovery of possession; 2. termination of the lease; 3. eviction of the tenant; 4. exercising a right of re-entry to premises; 5. seizure of any property, including for the purpose of securing payment of rent; 6. forfeiture; 7. damages; 8. payment of interest on, or a fee or charge relating to, unpaid rent or outgoings; 9. claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings; 10. performance of an obligation by the tenant or another person under a guarantee under the lease; or 11. exercising or enforcing another right by the landlord under the lease relating to the premises.	In the case of non-payment of rent, if the scenario below applies, a landlord cannot: 1. evict or attempt to evict a tenant; 2. re-enter or attempt to re-enter the premises; or 3. consistent with Leasing Principle 11 of the Code, having recourse against security provided.	A prohibited action means: 1. eviction of the tenant from the land or premises that are the subject of the small commercial lease; 2. exercising a right of re-entry to the land or premises that are the subject of the small commercial lease; 3. possession; 4. recovery of land; 5. distraint of goods; 6. forfeiture; 7. termination of the small commercial lease; 8. damages; 9. requiring a payment of interest on unpaid rent or on any other unpaid amount of money payable by the tenant to the landlord under the small commercial lease (including, without limitation, operating expenses); 10. recovery of the whole or part of any security for the performance of the tenant's obligations under the small commercial lease (including, without limitation, a security bond); 11. performance of obligations by the tenant or any other person under a guarantee given in respect of the small commercial lease (including, without limitation, making a demand on a bank guarantee; 12. any other remedy otherwise available to the landlord against the tenant at common law or under a written law.

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Actions for breach	**Principle 1:** Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period). Principle 9: 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. **Principle 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.	A landlord cannot take any 'prescribed action' against an impacted tenant on the grounds of a breach of the commercial lease during the prescribed period consisting of: 1. a failure to pay rent; or 2. a failure to pay outgoings; or 3. the business operating under the lease not being open for business during the hours specified in the lease. Landlord may take action on the grounds of a breach occurring prior to 24 April 2020. This does not prevent the landlord and tenant from agreeing to take other action under the commercial lease.	Landlords under affected leases must not take a prescribed action for: 1. a failure to pay rent; 2. a failure to pay outgoings; or 3. the business operating under the lease not being open for business during the hours specified in the lease, to the extent that these occur during the response period (ie 29 March 2020 and 30 September 2020), unless the parties otherwise agree. A landlord may take a prescribed action if: 1. if in accordance with: a. a variation of lease as negotiated under the Qld Regulation; b. a settlement agreement or other agreement entered into in relation to rent, outgoings and opening hours; or c. an order of a court or tribunal. 2. the landlord has made a genuine attempt to negotiate with the tenant and the tenant fails to comply with its obligations under the Qld Regulation; or 3. on a ground that is unrelated to the effects of COVID-19.	**Non-payment of rent** A tenant is not in breach of an eligible lease for failing to pay rent only if: 1. the tenant has properly requested rent relief from the landlord in accordance with the requirements of the Vic Regulations (Compliant Request), and complied with the tenant's obligations to negotiate the landlord's offer of rent relief in good faith but the rent relief has not yet been agreed between the landlord and tenant; or 2. the landlord and tenant have agreed to rent relief and the tenant has paid rent in accordance with that agreement. A tenant will be in breach for failing to pay rent (and the landlord can take action), if: 1. the tenant has not made a Compliant Request for rent relief and has not negotiated the landlord's offer in good faith; or 2. if the landlord and tenant have agreed to rent relief but the tenant is not paying rent in accordance with that agreement. **Change in trading hours** A tenant under an eligible lease is not in breach if during the operation of the Vic Regulations (i.e., 29 March 2020 to 29 September 2020, both dates inclusive) (**Relevant Period**) it reduces the opening hours of the business or closes the premises and ceases to carry on business at the premises. A landlord cannot take usual courses of action in response to a change in trading hours.	A landlord cannot take any prescribed action during the emergency period on the grounds of a breach occurring during the emergency period consisting of: 1. a failure to pay rent or any other amount of money payable by the tenant to the landlord (including, without limitation, a requirement under the lease to pay all or any of the landlord's operating expenses); 2. not being open for business at hours or times specified in the lease; 3. any act or omission prescribed by regulations. The regulations have not prescribed any act or omission for the purposes of paragraph 3.

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Recovery of outgoings	**Principle 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.	As above, a landlord cannot take any prescribed action against an impacted tenant on the grounds of a breach of the commercial lease during the prescribed period consisting of a failure to pay outgoings.	As above, a landlord cannot take any prescribed action under an affected lease on the ground of a failure to pay outgoings for a period occurring during the response period, unless the parties otherwise agree. If a tenant is unable to operate its business at its premises for any part of the response period because of COVID-19, a landlord may cease or reduce any services it provides to premises to the extent it is reasonable in the circumstances and subject to any reasonable request by the tenant.	If a tenant under an eligible lease is not able to operate their business at the premises for any part of the Relevant Period, the landlord must consider waiving recovery of outgoings and other expenses for the period during which the tenant is not able to operate. The landlord is entitled to cease or reduce the provision of services as is reasonable in the circumstances and in accordance with any reasonable request of the tenant.	If, during the emergency period, an eligible tenant is unable to conduct its business on the premises, the landlord must consider waiving recovery of any outgoing or other expense payable by the tenant to the landlord under the lease for the part of the emergency period that the tenant is not able to conduct its business at the premises. A landlord may cease to provide, or reduce provision of, services at the premises as is reasonable in the circumstances or in accordance with any reasonable request of an eligible tenant.
Rent reviews / increases	**Principle 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.	The NSW Regulation prevents the landlord from increasing an impacted tenant's rent payable. Once the 6 month period under the NSW Regulation comes to an end, the landlord cannot take any prescribed action against an impacted tenant for rent increase amounts that would have otherwise been introduced during the prescribed period of the NSW Regulation. This does not prevent the landlord and tenant from agreeing to take other action under the commercial lease.	A landlord must not increase the rent payable during the response period (other than turnover rent), unless the parties otherwise agree. If the lease provides for a review of rent during the response period, the landlord may review the rent under the lease but must not apply the rental increase until the response period ends, unless the parties otherwise agree. A landlord must not take a prescribed action in respect of a failure to pay a prohibited rental increase, unless the parties otherwise agree.	The Vic Regulations prevent a landlord from increasing rent under an eligible lease during the Relevant Period. This does not apply to turnover rent. The landlord and tenant may agree that this regulation preventing rent increases does not apply. The Vic Regulations do not prohibit landlords from recovering rent increases from tenants after the Relevant Period that would have been imposed during the Relevant Period if it were not for the application of the Vic Regulations.	Rent payable under a small commercial lease (other than turnover rent) cannot be increased during the emergency period.

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Passing on statutory charges	**Principle 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.	Where a commercial lease requires an impacted tenant to pay a proportion of the landlord's insurances, statutory charge or land tax, if the amount that the landlord is required to pay is reduced, this benefit must be passed on to the tenant. The tenant will be exempted from making the relevant payment only to the extent of the reduction received by the landlord. This does not prevent the landlord and tenant from agreeing to take other action under the commercial lease.	No corresponding provisions	If any outgoing charged or imposed on the landlord in relation to a premises is reduced, the landlord must pass on that reduction in the outgoing (on a proportionate basis) to the tenant. If the tenant has already paid the relevant outgoing (or the tenant's proportion of it) on the basis of the unreduced amount, the landlord must reimburse the tenant the excess amount paid by the tenant as soon as possible	If an outgoing charged against the landlord in relation to premises occupied by an eligible tenant is reduced, the landlord must not require the tenant to pay any amount of money in respect of the outgoing that is greater than the tenant's proportional share of the reduced outgoing payable under the lease. If an eligible tenant has already paid the landlord an amount greater than the tenant's proportional share of the reduced outgoing, the landlord must reimburse the excess amount to the tenant as soon as possible.

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Rent waivers and deferrals	**Principle 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. **See also Principles 4-5, 9-10.**	No corresponding provisions. Good faith negotiation under the NSW Regulations should have regard to leasing principles under the Code (inclusive of those providing for rent waivers/deferrals).	A party to an affected lease may, in writing, ask the other party to renegotiate rent and other stated conditions of the lease. Following notice, the parties must, as soon as practicable, give each other true, accurate, correct information relating to the request that is sufficient to enable the parties to negotiate in a fair and transparent way. *Examples of sufficient information: a clear statement about the terms of the lease the initiator is seeking to negotiate or evidence to demonstrate that the lease is an 'affected lease'.* Within 30 days of receiving sufficient information about a request, a landlord must offer the tenant a reduction in the amount of rent payable under the lease, and any proposed changes to the other stated conditions. The offer must relate to any or all of the rent payable during the response period and provide for a waiver of at least 50% of the rent reduction offered, unless the parties otherwise agree. The offer must have regard to a number of matters (identified in section 15 of the Qld Regulation). On receiving the landlord's offer, the parties must cooperate, act reasonably and in good faith in negotiating a reduction in the rent payable during the response period, including any related conditions. Any reduction, deferral or waiver of rent and any change in conditions of the lease should be documented through a variation of the lease.	If rent is deferred, the landlord must not request the payment of the deferred rent to commence until the earlier of: 1. the expiry of the Relevant Period (i.e., after 29 September 2020); and 2. expiry of the term of the eligible lease (disregarding any extension of the term provided for in the Vic Regulations). Unless otherwise agreed by the parties the deferred rent is amortised over the greater of: • the balance of the term of the eligible lease (as extended under the Vic Regulations); and • a period of no less than 24 months. Method of amortisation is as agreed between parties. Landlord may not require a tenant to pay any interest, fee or charge for a deferral. The Vic Regulations provide that this regulation does not apply if the landlord and tenant agree otherwise.	An eligible tenant may, during the emergency period, request rent relief from the landlord. The request must be in writing and must be accompanied by: 1. a statement by the tenant that: a. the tenant's lease is a small commercial lease; and b. the tenant is an eligible tenant in relation to the small commercial lease; 2. sufficient and accurate information that evidences that the tenant is an eligible tenant in relation to the small commercial lease; and 3. sufficient and accurate information that evidences the reduction in the tenant's turnover that: a. is associated with the business conducted at the premises; and b. the tenant has experienced during the emergency period. Within 14 days of receiving a request from the tenant (or such other period agreed between the parties), the landlord must offer rent relief to the tenant. The landlord's offer must be in writing and must be at least proportionate to the reduction in the tenant's turnover that: 1. is associated with the business conducted at the premises; and 2. the tenant has experienced during the emergency period *Example: If the tenant has experienced a 60% reduction in turnover, the rent relief offered should be at least 60% of the rent payable.*

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Rent waivers and deferrals *continued*			Either party may re-open negotiations if the ground on which the agreement for the reduction in rent is based changes in a material way. Furthermore, where the parties have reached an agreement in relation to rent relief, this does not prevent a party from seeking to negotiate a condition of an affected lease. If the parties agree to defer the payment of an amount of rent, the variation of lease between the parties giving effect to that arrangement must: • not require payment of the deferred rent until after the end of the response period; • require payment of the deferred rent to be amortised over a period of 2 to 3 years; and • not require the tenant to pay interest or any other fee or charge in relation to an amount of deferred rent, unless the tenant fails to comply with the conditions on which the rent is deferred, unless the parties otherwise agree. A landlord is entitled to retain any security deposit (interestingly this only mentions a security deposit and does not explicitly reference a bank guarantee or indemnity) after the lease ends and claim in relation to this security deposit (on the conditions in the lease in effect immediately before the lease expired) until the deferred rent has been paid.		Unless otherwise agreed by the parties, the reduction in the tenant's turnover is to be calculated using the principles of the decline in turnover test set out in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth). An offer of rent relief must provide that: 1. not less than 50% of the rent relief is to be in the form of a waiver of rent, unless the parties agree otherwise in writing; and 2. more than 50% of the rent relief is to be in the form of a waiver of rent if: a. failure to provide more than 50% of the rent relief in the form of a waiver of rent would compromise the tenant's capacity to fulfil the tenant's ongoing obligations under the lease; and b. the landlord has the financial capacity to provide more than 50% of the rent relief in the form of a waiver of rent. If the landlord is a tenant under a lease (the head lease) of the premises and the landlord, as the tenant, is provide rent relief under the head lease, the landlord must pass on the benefit of the rent relief to the tenant under the small commercial lease. Unless the landlord and tenant agree in writing: 1. If the parties agree to defer the payment of an amount of rent, the landlord must not request payment of any part of the deferred rent until the earlier of:

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Rent waivers and deferrals *continued*					a. the day the emergency period ends; or b. expiry of the term of the lease. 2. The parties must vary the lease, or otherwise agree, so that the tenant must pay the deferred rent to the landlord amortised over the greater of the following: a. the balance of the term of the lease; or b. a period of not less than 24 months. Rent relief may be given effect by the parties under a small commercial lease by: 1. a written variation to the small commercial lease; or 2. any other written agreement between the parties that gives effect to the rent relief, either directly or indirectly. If the parties have entered into an agreement regarding rent relief (the **existing agreement**) and tenant believes that the rent relief provided under the existing agreement is less favourable than the rent relief obtainable under the WA Regulation, the tenant may make a request for rent relief under the WA Regulations and the process regarding rent relief in the WA Regulation must be followed. An eligible tenant may also make a further request for rent relief in accordance with the processes set out in the regulations/code if the tenant's financial circumstances materially change during the emergency period after the first rent relief arrangement is entered into.

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Lease extensions	**Principle 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 Leasing Principle 3. 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. **See also Principle 9.**	No corresponding provisions. Good faith negotiation under the NSW Regulations should have regard to leasing principles under the Code (inclusive of those providing for lease extensions).	If rent is waived or deferred, the landlord must offer the tenant an extension to the term of the lease on the same conditions as in the lease except the rent payable during the extension is adjusted to account for the waiver or deferral. The extension must be equivalent to the period for which rent is waived or deferred, unless the parties otherwise agree. The obligation to offer an extension to the lease term: 1. only applies if the landlord is not subject to an existing legal obligation inconsistent with the obligation to extend (eg if the landlord has already entered into a binding heads of agreement with another tenant to lease the premises); and 2. does not apply if the landlord demonstrates that the lease cannot be extended because the landlord intends to use the leased premises for the landlord's own commercial purposes.	Any offer to extend the lease for the period of the deferral will apply unless a landlord and tenant agree that this obligation to extend does not apply to them. The terms and conditions of any extended lease must be the same as the lease before commencement of the Vic Regulations.	If rent is deferred, the landlord must offer the tenant an extension of the term of the lease on the same terms and conditions that applied under the lease immediately before the emergency period. The extension must be equivalent to the period for which the rent is deferred, unless the parties agree otherwise in writing. The obligation to offer an extension to the lease term will not apply if: 1. the landlord is the tenant under a lease (the head lease) of the premises that are the subject of the small commercial lease and the extension would be inconsistent with the head lease; or 2. the extension would be inconsistent with any contract or other agreement already entered into by the landlord with another person (other than the tenant)that relates to the landlord or premises that are the subject of the lease (including an agreement to lease the premises to the other person). Subject to paragraphs 1 and 2 above, the extension offered must be on the same terms and conditions that applied under the small commercial lease immediately before the emergency period.

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Good Faith Negotiation	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. **See Overarching Principles.**	Where an impacted tenant is a party to a commercial lease, both the tenant and the landlord may request for the other party to renegotiate the rent payable and other terns of the lease. The parties must negotiate these matters under the lease in good faith. When negotiating, the parties must have in mind: • the economic impact of the COVID-19 pandemic • the leasing principles set out in the Code, including Leasing Principles 3-5 relating to waivers and deferrals of rent. A landlord cannot take or continue to take any prescribed action for a breach of lease for a failure to pay rent during the prescribed period unless they have complied with the above good faith negotiation provisions. This only applies to failures to pay rent which occurs during the prescribed period. A landlord can take prescribed action for a failure to pay rent before 24 April 2020. When a tenant is in breach of the lease for a failure to pay rent, good faith negotiation provisions are not intended to prevent parties from coming to their own agreement	The parties under an affected lease must cooperate and act reasonably and in good faith in all discussions and actions associated with mitigation the effect of COVID-19 and negotiation of the rent payable under the lease. On receiving a landlord's offer of rent reduction, the parties must cooperate and act reasonably and in good faith in negotiating a reduction in the amount of rent payable under the lease for the response period, including any conditions relating to the reduction in rent. 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.	Parties to an eligible lease must negotiate in good faith the rent relief to apply during the Relevant Period. A tenant under an eligible lease may request rent relief from the landlord provided it makes a Compliant Request. If a tenant under ana eligible lease makes a Compliant Request, the landlord must offer rent relief within 14 days after receiving the tenant's request. A landlord's offer to provide rent relief must be based on all the circumstances of the eligible lease and: 1. relate to up to 100% of the rent payable during the Relevant Period; 2. provide that no less than 50% of the rent relief is in the form of a waiver, unless the parties otherwise agree in writing; 3. apply to the Relevant Period; and 4. take into account: a. the reduction in the tenant's turnover from the premises during the Relevant Period; b. any waiver given by the landlord; c. whether a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations under the lease; d. a landlord's financial ability to offer rent relief, including any relief provided to a landlord by its lenders as a response to the COVID-19 pandemic; and e. any reduction in outgoings charged or imposed on the premises.	In all negotiations associated with mitigation the effect of COVID-19 and of the rent payable under the lease, the parties must: 1. cooperate; 2. act reasonably and in good faith; 3. act in an open, honest and transparent manner; 4. provide each other with sufficient and accurate information that is reasonable for them to provide in the circumstances for the purposes of the negotiations; and 5. not make onerous demands for information from each other.

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Good Faith Negotiation *continued*				A tenant (but not a landlord) can re-open negotiations if the tenant's financial circumstances materially change after an agreement or variation as to rent relief has been reached.	

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Dispute Resolution	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.	**Mediation** <u>Retail Lease:</u> The existing dispute resolution regime under the Retail Leases Act NSW extends to the resolution of 'impacted commercial lease disputes' under the NSW Retail Regulation. If good faith negotiations fail, the Retail Leases Act NSW anticipates that parties should mediate their dispute by referring the dispute to the NSW Small Business Commissioner. An 'impacted commercial lease dispute' is a dispute where an impacted tenant is a party and the dispute concerns the liabilities and obligations under a commercial lease arising during the prescribed period. This includes disputes surrounding a renegotiation (or a failure to take part in a renegotiation) of rent payable. <u>Other Commercial Leases:</u> For relevant impacted commercial leases under the Conveyancing Act NSW, unless the NSW Small Business Commissioner has certified in writing that mediation offered by the NSW Small Business Commissioner has failed to resolve the dispute, a landlord cannot: 1. seek to recover possession of premises or land under the commercial lease; 2. terminate the commercial lease; or 3. exercise or enforce any other right of the landlord under the commercial lease.	**Mediation** If the renegotiation of an affected lease fails, either party may apply for mediation to the Small Business Commissioner by giving the Commissioner a dispute notice. If the Commissioner accepts the dispute notice, the Commissioner will nominate a mediator and a time and date for the mediation (which must be at least seven days after the notice is given). A party must attend the mediation (whether through an agent, officer or employee), unless it has a reasonable excuse. The Qld Regulation does not give any guide as to what constitutes a 'reasonable excuse'. Parties may be represented by a solicitor at the mediation, but only if the mediator considers that representation would assist the parties in mediating an outcome. If the parties reach an agreement at the mediation, the settlement agreement must be recorded in writing and signed by the parties. The mediator will then notify the Small Business Commissioner that the dispute has been resolved. Unless otherwise ordered by a court or QCAT, each party must pay its own costs incurred in relation to the mediation. The Small Business Commissioner must pay the mediator's fees and costs for the mediation.	**Mediation** If the renegotiation of an eligible lease fails: 1. a landlord or tenant may refer an eligible lease dispute to the Small Business Commission for mediation; and 2. a party cannot commence proceedings in VCAT or a court in relation to an eligible lease dispute until the Small Business Commission has certified in writing that the mediation has failed or unlikely to resolve the dispute. An eligible lease dispute will be a dispute about the terms of an eligible lease that arises in relation to a matter to which the Vic Regulations apply. The Vic Regulations prohibit parties from using mediation to prolong or frustrate reaching an agreement.	**Mediation** Under the WA Act, a dispute is defined as a dispute between the parties to a lease, or 1 or more parties to a lease and a person who has given a guarantee in respect of the lease, that arises out of, or in relation to, the operation of the WA Act and includes a dispute in relation to the yet to be drafted WA Code of Conduct and a financial hardship dispute. If a dispute arises and the lease is a small commercial lease (as defined in the WA Act) or the landlord is the owner or operator of a small business and the lease is granted in the course of that business, the parties can have recourse to the dispute resolution processes available to small business under the Small Business Act WA, namely they can request the Commissioner to: 1. provide assistance to attempt to resolve the dispute in accordance with section 15C of the Small Business Act WA; or 2. undertake alternative dispute resolution in respect of the dispute under section 15E of the Small Business Act WA. It is a function of the Commissioner to provide assistance to attempt to resolve such disputes and under section 15E of the Small Business Act WA the Commissioner may appoint a person with appropriate skills and experience to conduct the alternative dispute resolution.

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	Code	NSW	Queensland	Victoria	Western Australia
Dispute Resolution *continued*			A mediator must not mediate an eligible lease dispute if: 1. the dispute is about an issue between the parties that: a. is the subject of retail shop lease arbitration; b. has been the subject of an interim or final award in a proceeding for a retail shop lease arbitration; or c. is before, or has been decided by, a court; or 2. the dispute relates to a lease of premises used for the carrying on of the business of a service station mentioned in the *Retail Shop Leases Act 1994* (Qld), section 97(1)(c).		If a request is made for the Commissioner to assist in the resolution of a dispute and the Commissioner is satisfied that: 1. the dispute is unlikely to be resolved with the assistance of alternative dispute resolution; or 2. it would not be reasonable in the circumstances to commence an alternative dispute resolution proceeding in respect of the dispute; or 3. alternative dispute resolution has failed to resolve the dispute, the Commissioner must, upon the request of a party to the dispute, issue a certificate which effectively enables a party to have the dispute determined by the SAT.

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Code	NSW	Queensland	Victoria	Western Australia
Dispute Resolution *continued*	**Formal Proceedings** <u>Retail Lease:</u> Where mediation with the NSW Small Business Commissioner fails to resolve a dispute, parties can apply to NCAT for a hearing to deal with the dispute. In prescribed circumstances, a party to proceedings in NCAT can apply for proceedings to be transferred to the Supreme Court of NSW. The NSW Retail Regulation provides that NCAT or a court must have regard to the leasing principles under the Code when making a decision or order in relation to: 1. the recovery of possession of premises or land from a tenant; 2. the termination of a commercial lease by a tenant; and 3. the exercise or enforcement of another right of a landlord of premises or land. <u>Other Commercial Leases:</u> The NSW Conveyancing Regulation provides that a court must have regard to the leasing principles under the Code when making a decision or order in relation to: 1. the recovery of possession of premises or land from a tenant; 2. the termination of a commercial lease by a tenant; and 3. the exercise or enforcement of another right of a landlord of premises or land.	**Formal proceedings** A party to an eligible lease dispute may apply to QCAT, as provided under the QCAT Act, for an order to resolve the dispute if: 1. a. the parties to the dispute cannot reach a settlement agreement; b. a party to the dispute does not attend the mediation conference and does not have a reasonable excuse; c. the dispute is not settled within 30 days after the dispute notice is given to the Commissioner; or d. a party to a settlement agreement claims that another party to the agreement has not complied with the agreement within the period stated in it or, if not period is stated, within 14 days after the agreement is signed; and 2. no more than six months has elapsed since: a. the affected lease or small business lease ended, whether by expiry, surrender or termination; or b. the last day the tenant was required, under an agreement, to pay deferred rent.	**Formal Proceedings** The Small Business Commission must certify in writing that mediation has failed, or is unlikely to resolve the dispute, before a party can commence proceedings in VCAT or a court in relation to the dispute (unless leave is granted for proceedings in the Supreme Court). The Vic Regulations provide that VCAT must take into account in making an order: 1. the reduction in a tenant's turnover associated with the premises during the Relevant Period; 2. any waiver of recovery of outgoings and other expenses payable by the tenant; 3. whether a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations under the eligible lease, including the payment of rent; 4. a landlord's financial ability to offer rent relief, including any relief provided to a landlord by any of its lenders as a response to the COVID-19 pandemic; 5. any reduction to any outgoings charged, imposed or levied in relation to the premises; and 6. the certificate issued by the Small Business Commission that mediation has failed or is unlikely to resolve the dispute.	**Formal Proceedings** If a dispute arises under the WA Act, a party to the dispute may apply to the SAT to have the dispute determined. An application to the SAT cannot be made unless none of the parties have made a request to the Commissioner in respect of the dispute and the parties agree that the application can be made or a certificate has been issued by the Commissioner as set out above. Without limiting its powers under the *State Administrative Tribunal Act 2004*, in proceedings under the WA Act the SAT may make any order that it considers appropriate to resolve the dispute or proceedings including: 1. orders for a party to pay money or to do or refrain from doing certain things; 2. if the proceedings relate to a code of conduct dispute — any order that the SAT considers appropriate to give effect to the approved code of conduct such as the waiver or deferral of rent: 3. if the proceedings relate to a financial hardship dispute — an order terminating the small commercial lease; and 4. an order dismissing the proceedings; 5. any ancillary order that the SAT considers necessary for the purpose of enabling an order under this section to have full effect.

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	Code	NSW	Queensland	Victoria	Western Australia
Dispute Resolution *continued*			QCAT has jurisdiction to hear and decide eligible lease disputes unless: 1. the dispute is about an issue between the parties that: a. is the subject of retail shop lease arbitration; b. has been the subject of an interim or final award in a proceeding for a retail shop lease arbitration; or c. is before, or has been decided by, a court; or 2. the dispute relates to a lease of premises used for the carrying on of the business of a service station mentioned in the *Retail Shop Leases Act 1994* (Qld), section 97(1)(c); or 3. the amount, value or damages is more than the monetary limit within the meaning of the *District Court of Queensland Act 1967* (Qld), section 68. QCAT may make orders, including declaratory orders that it considers to be just to resolve an eligible lease dispute. The orders it may make are identified in section 44 of the Qld Regulation. In a proceeding about an eligible lease dispute, a court or tribunal, in hearing and deciding a matter, may have regard to the extent to which each party to the dispute has complied with its obligations, including: 1. complying with its obligation to cooperate and act in good faith with the other party; and 2. attempting to resolve the dispute before requesting mediation.		If the dispute relates to a code of conduct dispute the SAT must have regard to: 1. the financial impact of the COVID-19 pandemic on the tenant's business and capacity to meet the tenant's obligations under the lease; and 2. the landlord's financial capacity; and 3. the principles of proportionality and fairness, and any other relevant principles, set out in the adopted code of conduct. If the dispute is a financial hardship dispute: the SAT cannot order the termination of the a lease or any other order to the disadvantage of the tenant, unless satisfied that the tenant's breach was not a result of the tenant suffering financial hardship; SAT must dismiss the proceedings if the tenant's breach was as a result of financial hardship; and commentary during the debate of the bill introducing the WA Act indicates the landlord will bear the onus of proving the breach was not as a result of the tenant's financial hardship however SAT is empowered to order the production of documents to verify a tenant's finances.

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Code	NSW	Queensland	Victoria	Western Australia
Confidentiality	No corresponding provisions	A party to an eligible lease dispute must not disclose protected information obtained under or as a result of the operation of the Qld Regulation, other than: 1. with the consent of the party to whom the information relates; 2. to a professional advisor or financier who agrees to keep the information confidential; 3. to the extent the information is available to the public; 4. as authorised by the Small Business Commissioner; or 5. as authorised by law. A party must not use protected information for any purpose other than negotiating or resolving an eligible lease dispute. 'Protected information' means: 1. personal information; or 2. information relating to business processes or financial information, including information about the trade of a business. 'Personal information' means the name, address and contact details of an individual, other than the landlord or tenant of the lease the subject of an eligible lease dispute.	Parties to an eligible lease are prohibited from disclosing communications or information obtained in connection with the operation of the Vic Regulations except with consent, or to a professional adviser or financier, or as authorised by the Small Business Commission or at law, or for the purpose of any proceeding in court or tribunal. A landlord under an eligible lease may give the statement required to be provided by a tenant as part of a Compliant Request, to the Commissioner for State Revenue for the purpose of applying for tax relief.	A party to a small commercial lease must not, directly or indirectly, disclose protected information obtained under or in connection with the operation of the WA Regulation unless the protected information is disclosed in good faith: 1. with the consent of the party to whom the information relates; 2. to a professional advisor who agrees to keep the information confidential; 3. to an actual or prospective financier who agrees to keep it confidential; 4. under a written law; 5. for the purposes of making a request under section 18 of the WA Act; 6. for the purposes of resolving a dispute with the assistance of the Commissioner; 7. for the purposes of an alternative dispute resolution proceeding under the Small Business Development Corporation Act 1983 (WA) in respect of a dispute; 8. for the purposes of making an application under section 16(1) of the WA Act; 9. for the purposes of proceedings under the WA Act in the State Administrative Tribunal; or 10. for the purposes of proceedings in a court. 'Protected information' means: 1. personal information; or 2. information relating to business processes or financial information, including information about the trade of a business.

COVID-19 | National changes to commercial tenancies arrangements					
	Code	NSW	Queensland	Victoria	Western Australia
Non-COVID-19 related actions	**Principle 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	A landlord will not be prevented from taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic	The prohibition on prescribed action does not apply to a ground that is not related to the effects of COVID-19.	There is no restriction on a landlord from taking action, including terminating an eligible lease or drawing down on a security under an eligible lease, for breaches of the eligible lease other than non-payment of rent.	No corresponding provisions

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	Code	NSW	Queensland	Victoria	Western Australia
Financial Information	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 the Code. *Sufficient and accurate information* 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.	There is no prescriptive obligation on the tenant to provide financial information under the NSW Regulations. There is only an obligation on the parties to renegotiate, in good faith, the rent payable under the lease.	After a request is made to renegotiate the rent payable under a lease, the parties must, as soon as practicable, give each other information relating to the request that is: 1. true, accurate, correct and not misleading; and 2. sufficient to enable the parties to negotiate in a fair and transparent way. *Examples of sufficient information:* 1. *a clear statement about the terms of the lease the tenant is seeking to negotiate;* 2. *a statement by the tenant demonstrating why the lease is an affected lease, and accompanied by supporting evidence, including:* a. *accurate financial information or statements about the turnover of the tenant's business;* b. *information demonstrating that the tenant is an SME entity, having regard to any entities that the tenant is connected with, or an affiliate of;* c. *evidence of the tenant's eligibility for, or participation in, the JobKeeper Scheme;* d. *information about any steps the tenant is taken to mitigate the effects of the COVID-19 emergency on the tenant's business, including the details of any assistance being received by the tenant from the Commonwealth, State or a local government;*	If a tenant requests rent relief from a landlord, the tenant must provide the landlord information that evidences that the tenant is an SME entity and qualifies for, and is a participant in, the JobKeeper Scheme.	The landlord and the tenant under a small commercial lease: 1. must cooperate; 2. must act reasonably and in good faith; 3. must act in an open, honest and transparent manner; and 4. must provide each other with sufficient and accurate information that is reasonable for them to provide in the circumstances for the purposes of the negotiations; and *Example: information evidencing a reduction in turnover of a business might include information relating to turnover generated from an accounting system.* 5. must not make onerous demands for information from each other. A request made by a tenant to renegotiate the rent payable under the lease must be in writing and accompanied by: 1. sufficient and accurate information that evidences the tenant is an eligible tenant in relation to the small commercial lease; and 2. sufficient and accurate information that evidences the reduction in the tenant's turnover that: a. is associated with the business conducted at the premises under the lease; and the tenant has experienced during the emergency period.

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	Code	NSW	Queensland	Victoria	Western Australia
Financial Information *continued*			3. *in relation to a franchisor, information about any concession or benefit provided to or by the franchisor in relation to rent or outgoings for the premises occupied by the franchisee, and any undertakings to pass those concessions or benefits on to the franchisee.*		

Annexure 3: Application of Code to state conveyancing legislation

Property law provisions impacted by the leasing principles

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Conveyancing Act 1919* (NSW) (Act) or NSW Conveyancing Regulations	Corrs comments
1.	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).	Section 129 of the Act precludes a landlord from re-entering or terminating a lease by forfeiture under a lease provision until after service of a notice on the tenant (except in the case of non-payment of rent unless the lease terms stipulate service of a notice must occur in this instance). The legislation provides the opportunity for a tenant to be given notice to rectify breaches for which a landlord may be able to terminate or re-enter the premises under the lease terms. Section 4(1) of Schedule 5 of the Regulation prohibits a landlord from terminating a 'commercial lease' (as defined – see General Comments below) due to: • a failure to pay rent; • a failure to pay outgoings; and • the business operating under the lease not being open during the hours specified in the lease.	Leasing principle 1 provides further protection for tenants by prohibiting the termination of leases for non-payment of rent during the pandemic and recovery period. It effectively removes the right for a landlord to terminate without notice for non-payment of rent as preserved under section 129(8) of the Act. In addition, Leasing Principle 1 goes further than prohibiting termination rights under lease terms, and would be effective to prohibit a landlord's common law termination rights for repudiation and breach of essential term. The Code does not outline how long the prohibition will subsist for (being the pandemic period plus a reasonable subsequent recovery period) and we expect that the detail of this will be included in the new regulations to be enacted by the NSW Parliament. The Code is also silent on whether landlords are able to take action for non-payment of rent breaches which arose prior to the commencement of the pandemic period. Also, the Code is silent on what action a landlord can take and when action can be taken for the non-payment of rent during the pandemic period, following once the prohibition is lifted. The NSW Conveyancing Regulations do outline how long the prohibition will subsist for, being a 'prescribed period' (as defined) of sic months from the date of commencement of the amendments to the NSW Conveyancing Regulations (24 April 2020 to 23 October 2020). In addition, section 4(1) of Schedule 5 of the NSW Conveyancing Regulations extends Leasing Principle 1 to prohibit termination due to a tenant failing to pay outgoings (in addition to rent) or for reducing operating hours.

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Conveyancing Act 1919* (NSW) (Act) or NSW Conveyancing Regulations	Corrs comments
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.	There is no corresponding provision in the Act. Section 8 of Schedule 5 of the NSW Conveyancing Regulations expressly permits a landlord to take a 'prescribed action' (as defined – see General Comments below) on grounds that are unrelated to the economic impacts of the COVID-19 pandemic (as an example, if the tenant breaches the lease by damaging the premises).	Leasing Principle 2 may preserve the right for a landlord to take action for breach of lease covenant, tenant repudiation or breach of essential term subject to Leasing Principle 1. This would be subject to Leasing Principle 14 (see below). The Leasing Principles do not consider obligations under leases for either party to carry out fitout works, capital works or expend other amounts of money during the pandemic and recovery period. Such obligations could have serious financial implications for either party in the context of these Leasing Principles generally. In incorporating the Leasing Principles into the NSW Conveyancing Regulations there has been specific carve out for the taking of, and preservation of the landlord's rights to take, any defined prescribed action in respect of a breach of the commercial lease by the tenant that is not related to the economic impacts of the COVID-19 pandemic. We do not expect however that this Leasing Principle will be applied harshly against tenants in a way that neutralises the benefit of the legislative protections.

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Conveyancing Act 1919* (NSW) (Act) or NSW Conveyancing Regulations	Corrs comments
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.	Section 120 of the Act states that where an actual waiver of the benefit of any covenant or condition in a lease on the part of a landlord is proven, that waiver will not be held: • to extend to any instance or any breach of covenant or condition other than that to which the waiver specifically relates; or • to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears. Sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation allow any party to a commercial lease, where the tenant is an 'impacted lessee' (as defined – see General Comments below), to request to renegotiate the rent payable under, and other terms of, the lease, such renegotiation to be in good faith and having regard to the economic impacts of the COVID-19 pandemic and the Leasing Principles. Under section 5(1) of Schedule 5 of the NSW Conveyancing Regulation, a landlord is prohibited from taking or continuing any unilateral prescribed action against a tenant on grounds of a breach of the commercial lease consisting of a failure to pay rent during the prescribed period unless the landlord has complied with the requirements in sections 5(2), 5(3) and 5(4)	Leasing Principle 3 requires a landlord to offer its tenant reductions in rent in the form of a waiver/deferral. As a tenant's payment of a reduced rent (or non-payment of rent) would otherwise be a breach of the lease, section 120 of the Act operates to maintain the landlord rights in respect of other breaches of the lease by the tenant (where such rights cannot be exercised by a landlord due to the tenant's reduced rent or non-payment during the COVID-19 pandemic period (or reasonable subsequent recovery period)). The use of the word 'and other terms of' in sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation appear to permit a potential renegotiation of the entire commercial lease (as opposed to limiting any changes resulting from renegotiation to provisions of the lease related to the payment of rent). A party is not required to agree however, to the amendment of or addition to the terms of the lease that are not related to either the payment of rent or (noting the requirement in section 5(4) to have regard to the Leasing Principles) and which are not related to: • waivers anticipated by Leasing Principle #4; • deferrals anticipated by Leasing Principle #5; • the landlord's sharing of benefits anticipated by Leasing Principle #7; • the waiving of the recovery of expenses and outgoings as a result of the tenant not trading anticipated by Leasing Principle #8; • any extension of periods for repayment anticipated by Leasing Principle #9; • the prohibition of fees, charges and interest anticipated by Leasing Principle #10; and • any extensions of the lease anticipated by Leasing Principle #12. The NSW Conveyancing Regulation expressly notes that the operation of section 5(1) of Schedule 5 of the NSW Conveyancing Regulation does not prevent parties to a commercial lease coming to agreements relating to the lease (for instance, a tenant agreeing to pay full rent during the prescribed period).

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Conveyancing Act 1919* (NSW) (Act) or NSW Conveyancing Regulations	Corrs comments
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.	See our comments as to sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation at #3 above.	While Leasing Principle #4 has not been expressly included in the NSW Conveyancing Regulation, section 5(4) of Schedule 5 of the NSW Conveyancing Regulation requires any renegotiation of a commercial lease during the prescribed period to have regard to that Leasing Principle. See comments at #3 above.
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.	See our comments as to sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation at #3 above.	While Leasing Principle #5 has not been expressly included in the NSW Conveyancing Regulation, section 5(4) of Schedule 5 of the NSW Conveyancing Regulation requires any renegotiation of a commercial lease during the prescribed period to have regard to that Leasing Principle. See comments at #3 above.
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.	There is no corresponding provision in the Act. Section 4(4) of Schedule 5 of the NSW Conveyancing Regulation deals with the requirement of a tenant under a provision of a commercial lease to pay a fixed amount in respect of land tax, any other statutory charge (such as council rates) or insurance, in the event such tax, charge or insurance is payable by the landlord and is reduced. In these circumstances, the tenant is exempted from the operation of the provision of the lease to the extent of the reduction received by the landlord.	The Leasing Principle appears to be a straight pass through of any percentage reduction granted to the landlord, to corresponding amounts payable by the tenant, and this has been reflected in the NSW Conveyancing Regulation.

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Conveyancing Act 1919* (NSW) (Act) or NSW Conveyancing Regulations	Corrs comments
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.	There is no corresponding provision in the Act. See our comments as to sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation at #3 above.	This appears to be a straight pass through of any deferral period or percentage reduction granted to the landlord by a financier, to amounts payable by the tenant during the same period. The logical inference to be drawn is that this would apply to periodic payments of rent under the lease which would typically fund finance repayments, but this is not specified and the benefit could be interpreted to extend to encompass all amounts payable by the tenant under the lease (e.g. outgoings and other costs and charges whether periodic or not). While Leasing Principle #7 has not been expressly included in the NSW Conveyancing Regulation, section 5(4) of Schedule 5 of the NSW Conveyancing Regulation requires any renegotiation of a commercial lease during the prescribed period to have regard to that Leasing Principle. See comments at #3 above.
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.	There is no corresponding provision in the Act. See our comments as to sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation at #3 above.	Unlike Leasing Principle 3, there is no prohibition on landlords taking action for non-payment of outgoings or other amounts (excluding rent) for tenants who are "able to trade" and Leasing Principle 2 would support this. The rationale appears to be that if a tenant is trading, it should contribute towards the landlord's costs of operating the building/centre. This would create a burden for a landlord where some tenants in a multi-tenanted building have chosen not to trade but operational services are still required (e.g. lifts, air conditioning, etc). Leasing Principle 8 provides some relief to landlords by permitting them to reduce some services to reduce this burden. While Leasing Principle #8 has not been expressly included in the NSW Conveyancing Regulation, section 5(4) of Schedule 5 of the NSW Conveyancing Regulation requires any renegotiation of a commercial lease during the prescribed period to have regard to that Leasing Principle. See comments at #3 above.
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.	There is no corresponding provision in the Act. See our comments as to sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation at #3 above.	Leasing Principle 9 contemplates that the parties will negotiate a plan for repayment of amounts owed by a tenant for a period after the pandemic ends (including a reasonable subsequent recovery period). There is no guidance on the timing of how long a repayment period could extend and a successful negotiation will depend on the individual circumstances. The impact of subsequent market conditions and how they will affect a negotiated repayment plan will not be known for some time. While Leasing Principle #9 has not been expressly included in the NSW Conveyancing Regulation, section 5(4) of Schedule 5 of the NSW Conveyancing Regulation requires any renegotiation of a commercial lease during the prescribed period to have regard to that Leasing Principle. See comments at #3 above.

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Conveyancing Act 1919* (NSW) (Act) or NSW Conveyancing Regulations	Corrs comments
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.	There is no corresponding provision in the Act. See our comments as to sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation at #3 above.	Repayment plans negotiated with tenants cannot include interest charges on unpaid or deferred rent. Leasing Principle 10 does not specifically prohibit the application of interest to any unpaid outgoings or other costs and changes payable by a tenant under a lease. While Leasing Principle #10 has not been expressly included in the NSW Conveyancing Regulation, section 5(4) of Schedule 5 of the NSW Conveyancing Regulation requires any renegotiation of a commercial lease during the prescribed period to have regard to that Leasing Principle. See comments at #3 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.	There is no corresponding provision in the Act. Section 4(1)(a) and 4(1)(b) of Schedule 5 of the NSW Conveyancing Regulation prohibit a landlord from recovery during the prescribed period of the whole or part of a security bond under a commercial lease due to: • a failure to pay rent; and • a failure to pay outgoings.	The NSW Conveyancing Regulation extends Leasing Principle #11 to prohibit the landlord's recovery of the whole or part of a security bond due to a tenant failing to pay outgoings (in addition to rent) during the prescribed period. it is not clear from the NSW Conveyancing Regulation which amounts are permitted to be recovered from the security once the prohibition is lifted. On a strict reading of the NSW Conveyancing Regulation, a landlord would be entitled to recover from the security any amounts unpaid by a tenant during the prescribed period on and from the day immediately after the prescribed period ends.
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.	There is no corresponding provision in the Act. See our comments as to sections 5(2), 5(3) and 5(4) of Schedule 5 of the NSW Conveyancing Regulation at #3 above.	The logical inference is that the provisions of Part 8 of the Conveyancing Act will apply to any extension of lease anticipated by Leasing Principle #2 so that all rights of the landlord are restored during the extension period. Landlords are required to negotiate extension terms and continue to lease to tenants whose trading may not have been strong even before the pandemic arose or who a landlord may not have otherwise chosen to re-lease the premises to in ordinary circumstances. Leasing Principle 12 effectively forces a landlord to tie up a property and continue to lease to an existing tenant beyond the term initially contemplated in the original lease. Some market distortion would be expected as a consequence in the pandemic recovery period. This may have an impact on market rents and property valuations. While Leasing Principle #12 has not been expressly included in the NSW Conveyancing Regulation, section 5(4) of Schedule 5 of the NSW Conveyancing Regulation requires any renegotiation of a commercial lease during the prescribed period to have regard to that Leasing Principle. See comments at #3 above.

New South Wales			
	Leasing Principles	Inconsistencies with or impacts on *Conveyancing Act 1919* (NSW) (Act) or NSW Conveyancing Regulations	Corrs comments
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.	There is no corresponding provision in the Act. Section 4(2) of Schedule 5 of the NSW Conveyancing Regulation requires that during the prescribed period, the rent payable under a commercial lease (other than rent or a component of rent determined by reference to turnover) must not be increased. Section 4(3) of Schedule 5 of the NSW Conveyancing Regulation prohibits a landlord from taking any prescribed action against the tenant after the prescribed period for failure to pay an amount representing a rent increase during the prescribed period.	Leasing Principle 13 is worded ambiguously ("landlords agree to a rent freeze") and appears to be a general prohibition on rent increases for all tenancies during the pandemic and recovery period. This would appear to apply irrespective of the trading strength of individual tenants with the burden of this and the impact on building valuations carried by all landlords. Again, this would create some market distortion. Section 4(2) of Schedule 5 of the NSW Conveyancing Regulation operates to freeze base rent increases during the prescribed period while permitting an increase in turnover rent (should a tenant's turnover increase during the prescribed period), and section 4(3) of Schedule 5 of the NSW Conveyancing Regulation prohibits a landlord from taking action against a tenant in respect of a purported rent increase after the prescribed period.
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.	There is no corresponding provision in the Act. Section 4(1)(c) of Schedule 5 of the NSW Conveyancing Regulation prohibits a landlord from taking a prescribed action for breach under a commercial lease if a tenant's business is not open and operating during the hours required in the lease.	There appears to be a typographical error. It seems as though the wording should read: *"Landlords may not apply any prohibition OR levy any penalties..."* This is self-explanatory but clashes with Leasing Principle 2. It is not clear what prohibition there might be in a lease where tenant fails to trade, but it is clear that a landlord cannot impose a penalty for non-trade by a tenant for any reason "due to the pandemic" which is quite broad and could potentially encompass reasons such as reduced foot traffic, illness or inability to hire staff or obtain stock.

General comments regarding the Leasing Principles and NSW legislation:

Leasing Principles

- Section 20 of the Australian Consumer Law will continue to apply.
- Parties would need to consider the impact of these arrangements and any negotiated agreements on their successors in title (e.g. transferees of the landlord's interest in the land or the tenant's interest in the lease).
- The Leasing Principles are silent regarding costs of the parties, particularly in relation to recovery of costs by a landlord relating to breach by a tenant once the prohibitions are lifted.
- The Leasing Principles do not contemplate any provisions relating to actions by secured financiers, trustees in bankruptcy, receivers or managers or liquidators of tenants during the pandemic or recovery period.

Conveyancing (General) NSW Conveyancing Regulation 2018 (NSW)

- The *Conveyancing (General) NSW Conveyancing Regulation 2018* (NSW) (**General NSW Conveyancing Regulation**) has been amended by Schedule 1 of the *Retail and Other Commercial Leases (COVID-19) NSW Conveyancing Regulation* (NSW) which commenced on 24 April 2020. These amendments are to operate for a prescribed period of 6 months from the date of commencement (until 23 October 2020).
- Schedule 1 of the *Retail and Other Commercial Leases (COVID-19) NSW Conveyancing Regulation* (NSW) amends the General NSW Conveyancing Regulation by inserting a new Schedule 5 (Commercial leases – COVID-19 pandemic special provisions), which introduces into the General NSW Conveyancing Regulation:
  - the prohibitions and restrictions as to prescribed actions; and
  - the obligations of landlords and tenants,
- set out in the National Code of Conduct's Leasing Principles, and applies those principles to commercial leases where the tenant is an impacted lessee.
- Under the new Schedule 5 of the General NSW Conveyancing Regulation:
  - a "commercial lease" is an agreement to which the *Conveyancing Act 1919* (NSW) applies relating to the leasing of premises or land for commercial purposes (but does not include a lease entered into after the commencement of the schedule (not being a lease entered into by means of an option to extend or renew the lease, or any extension or renewal of an existing lease) on the same terms as the existing lease, or a retail shop lease under the *Retail Leases Act 1994* (NSW), or a lease under the *Agricultural Tenancies Act 1990* (NSW));
  - a tenant is an "impacted lessee" if the tenant qualifies for the JobKeeper Scheme under the sections 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) and:
    - if the tenant is a franchisee, the turnover (including internet sales of goods and services) of the business conducted at the premises or land in the 2018-2019 financial year was less than $50 million; or
    - if the tenant is a corporation that is a member of a group (being related bodies corporate under the *Corporations Act 2001* (Cth), the turnover (including internet sales of goods and services) of the group in the 2018-2019 financial year was less than $50 million; or
    - in any other case, the turnover (including internet sales of goods and services) of the tenant in the 2018-2019 financial year was less than $50 million; and
  - "prescribed actions" include taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunals for: eviction of the tenant from the leased premises or land, exercising a right of re-entry to leased premises or land, recovery of the leased premises or land, distraint (seizure) of goods (to obtain money owed), forfeiture, damages, the payment of interest on (or a fee or charge related to) unpaid rent, recovery of the whole or part of a security bond, performance of obligations by the tenant or guarantor, possession, termination of the lease, and any other remedy otherwise available to a landlord against a tenant at common law or the law of New South Wales.
  - an act or omission or a tenant required under a federal or state law in response to the COVID-19 pandemic is taken not to amount to breach of a commercial lease, and does not constitute grounds for termination of the lease or the taking of any prescribed action by the landlord against the tenant (section 4(5));
  - parties to a commercial lease may agree to the taking of action in relation to the lease (such as the taking of a prescribed action by the landlord or the termination of the lease) (section 4(6));
  - mediation offered by the NSW Small Business Commissioner in relation to a dispute between the parties regarding the renegotiation of commercial lease terms must first be undertaken between the parties, and fail, before a landlord may commence proceedings for recovery of possession of premises or land under a commercial lease, for termination of the commercial lease, or for the exercise or enforcing of any other right under the commercial lease. Further, the Commissioner must certify in writing that mediation has failed to resolve the dispute, and give reasons for such failure (section 6); and
  - a Court must have regard to the Leasing Principles when considering whether to make a decision or order relating to a landlord's recovery of possession of premises or land, termination of commercial lease, or exercise or enforcement of another right held by the landlord (section 7), and the rules of equity and of common law are preserved in this regard (section 9).

Queensland

	Leasing Principles	Inconsistencies with or impacts on *Property Law Act 1974* (Qld) or Regulations	Corrs comments
1.	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).	Section 124 of the Act precludes a landlord from re-entering or terminating a lease by forfeiture under a lease provision until after service of a notice on the tenant (including in the case of non-payment of rent). The legislation provides the opportunity for a tenant to be given notice to rectify breaches for which a landlord may be able to terminate or re-enter the premises under the lease terms.	A landlord is prohibited from taking a prescribed action for a failure by the tenant to pay rent or outgoings or open for trade during the hours prescribed by the lease to the extent these occur during the *response period*, ie 28 March 2020 to 30 September 2020. A landlord is not prohibited from taking a prescribed action if it is: • in accordance with a variation of lease, settlement agreement or order of the Court, • the landlord has made a genuine attempt to negotiate with the tenant and the tenant fails to comply with its obligations under the Qld Regulation; • on a ground that is unrelated to the COVID-19 pandemic; or • where otherwise agreed by the parties.
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.	There is no corresponding provision in the Act.	See comments on #1 above.
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.	Section 119 of the Act states that where an actual waiver of the benefit of any covenant or condition in a lease on the part of a landlord is proven, that waiver will not be held: • to extend to any instance or any breach of covenant or condition other than that to which the waiver specifically relates; or • to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears.	Leasing Principle 3 requires a landlord to offer its tenant reductions in rent in the form of a waiver/deferral. As a tenant's payment of a reduced rent (or non-payment of rent) would otherwise be a breach of the lease, section 119 of the Act operates to maintain the landlord's rights in respect of other breaches of the lease by the tenant (where such rights cannot be exercised by a landlord due to the tenant's reduced rent or non-payment during the COVID-19 pandemic period (or reasonable subsequent 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.		See comments on #3 above.

Queensland

	Leasing Principles	Inconsistencies with or impacts on *Property Law Act 1974* (Qld) or Regulations	Corrs comments
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.		See comments on #3 above.
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.	There is no corresponding provision in the Act.	This appears to be a straight pass through of any percentage reduction granted to the landlord, to corresponding amounts payable by the tenant. The Qld Regulation does not include a provision to give effect to Leasing Principle 6.
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.	There is no corresponding provision in the Act.	This appears to be a straight pass through of any deferral period or percentage reduction granted to the landlord by a financier, to amounts payable by the tenant during the same period. The logical inference to be drawn is that this would apply to periodic payments of rent under the lease which would typically fund finance repayments, but this is not specified and the benefit could be interpreted to extend to encompass all amounts payable by the tenant under the lease (e.g. outgoings and other costs and charges whether periodic or not).
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.	There is no corresponding provision in the Act.	If the tenant is unable to operate a business from its premises for any part of the response period because of the COVID-19 emergency, the landlord may cease or reduce any service to the premises to the extent it is reasonable in the circumstances (and subject to any reasonable request by the tenant). See comments on #1 above.
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.	There is no corresponding provision in the Act.	Leasing Principle 9 contemplates that the parties will negotiate a plan for repayment of amounts owed by a tenant for a period after the pandemic ends (including a reasonable subsequent recovery period). Section 18(2) of the Regulation confirms that deferred rent payments are not due until 1 October 2020 and are to be amortised over a period of no less than 2 and no more than 3 years, unless the parties otherwise agree. Under section 18 of the Regulation, landlords must offer tenants an extension of lease equivalent to the rent deferral period, unless the landlord has a legal obligation to the contrary or is able to demonstrate that the lease cannot be extended due to a commercial purpose of the landlord.
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.	There is no corresponding provision in the Act.	The Qld Regulation specifically identifies the payment of interests, fees or charges on unpaid rent or outgoings as a prescribed action. However, a landlord is not prohibited from requiring a tenant to pay interest or any other fee or charge where the tenant fails to comply with the conditions of any deferred rent payment.

Queensland

	Leasing Principles	Inconsistencies with or impacts on *Property Law Act 1974* (Qld) or Regulations	Corrs comments
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.	There is no corresponding provision in the Act.	See section 15 above for a discussion of the issue of drawing down on tenant securities.
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.	There is no corresponding provision in the Act.	Landlords are required to negotiate extension terms and continue to lease to tenants whose trading may not have been strong even before the pandemic arose or who a landlord may not have otherwise chosen to re-lease the premises to in ordinary circumstances. Some market distortion would be expected as a consequence in the pandemic recovery period. This may have an impact on market rents and property valuations.
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.	There is no corresponding provision in the Act.	A landlord must not increase the rent payable during the response period (other than turnover rent), unless the parties otherwise agree. If the lease provides for a review of rent during the response period, the landlord may review the rent under the lease but must not apply the rental increase until the response period ends, unless the parties otherwise agree. A landlord must not take a prescribed action in respect of a failure to pay a prohibited rental increase, unless the parties otherwise agree.
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.	There is no corresponding provision in the Act.	There appears to be a typographical error. It seems as though the wording should read: *"Landlords may not apply any prohibition OR levy any penalties..."* It is clear that a landlord cannot take prescribed action for a tenant's failure to open for the hours required under the lease during the response period. This is a broad prohibition, however is it tempered by the carve out in respect of breaches on grounds unrelated to the pandemic. It is arguable that tenants could claim that reduced foot traffic, illness or inability to hire staff or obtain stock are grounds for reduced hours which are related to the pandemic.

Victoria

	Leasing principles	Inconsistencies with or impacts on *Property Law Act 1958* (Vic) or Regulations	Corrs comments
1.	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).	Section 146(12) of the Act precludes a landlord from re-entering or terminating a lease by forfeiture under a lease provision until after service of a notice on the tenant (except in the case of non-payment of rent unless the lease terms stipulate service of a notice must occur in this instance). The legislation provides the opportunity for a tenant to be given notice to rectify breaches for which a landlord may be able to terminate or re-enter the premises under the lease terms.	Leasing principle 1 provides further protection for tenants by prohibiting the termination of leases for non-payment of rent during the pandemic and recovery period. It effectively removes the right for a landlord to terminate without notice for non-payment of rent as preserved under section 146(12) of the Act. In addition, Leasing Principle 1 goes further than prohibiting termination rights under lease terms, and would be effective to prohibit a landlord's common law termination rights for repudiation and breach of essential term. The Vic Regulations clarify that the prohibition on termination only applies: • from 29 March 2020 to 29 September 2020 (both dates inclusive) (**Relevant Period**); • if the tenant under an *eligible lease* has submitted a request for rent relief that complies with the requirements of the Vic Regulations; and • if the landlord and tenant have agreed to rent relief, the tenant is paying rent in accordance with that agreement. • The Code and the Vic Regulations are silent on whether landlords are able to take action for non-payment of rent breaches which arose prior to the commencement of the Relevant Period. Our view is that the prohibition on taking action for non-payment of rent during the Relevant Period is broad enough to prohibit the recovery of arrears that are owing before commencement of the Relevant 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.	There is no corresponding provision in the Act.	Leasing Principle 2 may preserve the right for a landlord to take action for breach of lease covenant, tenant repudiation or breach of essential term subject to Leasing Principle 1. This would be subject to Leasing Principle 14 (see below). The Leasing Principles do not consider obligations under leases for either party to carry out fitout works, capital works or expend other amounts of money during the pandemic and recovery period. Such obligations could have serious financial implications for either party in the context of these Leasing Principles generally. As Leasing Principle 2 is not reflected in the Vic Regulations our view is that landlords retain all of their rights under a lease (including termination and having recourse to security) for any breach by a tenant, whether or not it is a substantive term, other than non-payment of rent.

Victoria

	Leasing principles	Inconsistencies with or impacts on *Property Law Act 1958* (Vic) or Regulations	Corrs comments
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.	Section 148 of the Act states that where an actual waiver of the benefit of any covenant or condition in a lease on the part of a landlord is proven, that waiver will not be held: • to extend to any instance or any breach of covenant or condition other than that to which the waiver specifically relates; or • to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears.	Leasing Principle 3 requires a landlord to offer its tenant reductions in rent in the form of a waiver/deferral. As a tenant's payment of a reduced rent (or non-payment of rent) would otherwise be a breach of the lease, section 148 of the Act operates to maintain the landlord rights in respect of other breaches of the lease by the tenant (where such rights cannot be exercised by a landlord due to the tenant's reduced rent or non-payment during the COVID-19 pandemic period (or reasonable subsequent recovery period)). Whilst the Code requires the rent relief to be based on the reduction in the tenant's trade, the Vic Regulations require "all the circumstances of the eligible lease" to be considered when determining the rent relief to be offered. Regulation 10 of the Vic Regulations provides that the landlord's offer: • may relate to up to 100% of the rent payable during the Relevant Period; • must provide no less than 50% of the rent relief in the form of a waiver (unless the parties agree otherwise in writing); • apply to the Relevant Period; and • take into account: – the reduction in the tenant's turnover from the premises during the Relevant Period; – any waiver given by the landlord; – whether a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations under the lease; – a landlord's financial ability to offer rent relief, including any relief provided to a landlord by any of its lenders as a response to COVID-19; and – any reduction in outgoings charged or imposed on the premises. Regulation 11 of the Vic Regulations allows a tenant (but not a landlord) to re-open negotiations if the tenant's financial circumstances materially change after an agreement has been reached regarding rent relief. Whether a landlord can initiate these negotiations is unclear as it is not contemplated in the Vic Regulations. Regulation 11(2) provides that a landlord's subsequent offer of rent relief (i.e. an offer made in response to a change in the tenant's financial circumstances) does not need to comply with the requirement for at least 50% of the rent relief to be provided in the form of a rent waiver.

Victoria			
	Leasing principles	Inconsistencies with or impacts on *Property Law Act 1958* (Vic) or Regulations	Corrs comments
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.		See comments on #3 above.
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.		See comments on #3 above. Regulation 16 of the Vic Regulations states that the method of amortisation is to be agreed between 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.	There is no corresponding provision in the Act.	This appears to be a straight pass through of any percentage reduction granted to the landlord, to corresponding amounts payable by the tenant. The Vic Regulations expand the position under the Code in relation to outgoings under an *eligible lease* and state that if "any outgoings charged, imposed or levied in relation to the premises" are reduced, the landlord must pass that reduction onto the tenant (on a proportionate basis). If the tenant has already paid its proportion of the relevant outgoing (on the basis of the unreduced amount) the landlord must reimburse the tenant the excess amount paid. "Outgoings" is broadly defined under the Vic Regulations.
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.	There is no corresponding provision in the Act.	This appears to be a straight pass through of any deferral period or percentage reduction granted to the landlord by a financier, to amounts payable by the tenant during the same period. The logical inference to be drawn is that this would apply to periodic payments of rent under the lease which would typically fund finance repayments, but this is not specified and the benefit could be interpreted to extend to encompass all amounts payable by the tenant under the lease (e.g. outgoings and other costs and charges whether periodic or not).

Victoria			
	Leasing principles	Inconsistencies with or impacts on *Property Law Act 1958* (Vic) or Regulations	Corrs comments
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.	There is no corresponding provision in the Act.	Unlike Leasing Principle 3, there is no prohibition on landlords taking action for non-payment of outgoings or other amounts (excluding rent) for tenants who are 'able to trade' and Leasing Principle 2 would support this. The rationale appears to be that if a tenant is trading, it should contribute towards the landlord's costs of operating the building/centre. This would create a burden for a landlord where some tenants in a multi-tenanted building have chosen not to trade but operational services are still required (e.g. lifts, air conditioning, etc). Leasing Principle 8 provides some relief to landlords by permitting them to reduce some services to reduce this burden. The Vic Regulations extend the position under the Code in respect of *eligible leases* by entitling a landlord to not only reduce services but to also "cease to provide" services if it is reasonable in the circumstances and in accordance with a reasonable request from a tenant.
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.	There is no corresponding provision in the Act.	Leasing Principle 9 contemplates that the parties will negotiate a plan for repayment of amounts owed by a tenant for a period after the pandemic ends (including a reasonable subsequent recovery period). There is no guidance on the timing of how long a repayment period could extend and a successful negotiation will depend on the individual circumstances. The impact of subsequent market conditions and how they will affect a negotiated repayment plan will not be known for some time. The Vic Regulations generally reflect the position under the Code with subtle differences. Whilst the Code states that "no repayment should commence" the Vic Regulations state that the landlord "must not request payment", it is therefore open to tenants to commence repayments earlier should they choose to do so.
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.	There is no corresponding provision in the Act.	Repayment plans negotiated with tenants cannot include interest charges on unpaid or deferred rent. Leasing Principle 10 does not specifically prohibit the application of interest to any unpaid outgoings or other costs and changes payable by a tenant under a lease.

Victoria			
	Leasing principles	Inconsistencies with or impacts on *Property Law Act 1958* (Vic) or Regulations	Corrs comments
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.	There is no corresponding provision in the Act.	The Vic Regulations clarify that the restriction on a landlord under an *eligible lease* having recourse against security will only apply if the tenant has made a Compliant Request for rent relief and, following agreement being reached regarding the rent relief, has paid the rent in accordance with the agreement The Vic Regulations do not expressly deal with whether a landlord can have recourse against security in relation to a tenant's failure to pay rent prior to commencement of the Relevant Period. Our view is that, provided the tenant has made a Compliant Request and negotiated the landlord's offer in good faith in accordance with Regulations 10(1) to (5), the prohibition on recourse against security for non-payment of rent during the Relevant Period is broad enough to prohibit the recovery of arrears that are owing before the Relevant 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.	There is no corresponding provision in the Act.	The logical inference is that the provisions of Part 2 Division 5 of the Property Law Act will apply to any extension of lease anticipated by Leasing Principle #2 so that all rights of the landlord are restored during the extension period. Landlords are required to negotiate extension terms and continue to lease to tenants whose trading may not have been strong even before the pandemic arose or who a landlord may not have otherwise chosen to re-lease the premises to in ordinary circumstances. Leasing Principle 12 effectively forces a landlord to tie up a property and continue to lease to an existing tenant beyond the term initially contemplated in the original lease. Some market distortion would be expected as a consequence in the pandemic recovery period. This may have an impact on market rents and property valuations. The Vic Regulations differ to Leasing Principle 12 in two key respects: • the Code contemplates the extension being for a period equivalent to the "rent waiver and/or deferral" whereas the Vic Regulations state that the extension offered only needs to be equivalent to the period for which rent is deferred (not waived); and • the Vic Regulations allow for the parties to agree to not extend the term.

Victoria

	Leasing principles	Inconsistencies with or impacts on *Property Law Act 1958* (Vic) or Regulations	Corrs comments
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.	There is no corresponding provision in the Act.	The Vic Regulations do not prohibit landlords from recovering rent increases from tenants after the Relevant Period that would have been imposed during the Relevant Period if it were not for the application of the Vic Regulations. Because there is no express prohibition on such recovery, and the Vic Regulations expressly provides that the parties may agree that the prohibition on rent increases does not apply, our view is that (subject to the comments on good faith below) it is open to landlords to negotiate with tenants the recovery of lost rent increases on the reduced rent payable by the tenant during the Relevant Period, but not rent increases on the full rent that would have been payable if it were not for the waiver. The Vic Regulations do require the parties to act in good faith in negotiating the terms of any rental arrangements during the Relevant Period. To satisfy this good faith obligation, a landlord would need to assess whether it is appropriate to recover lost rent increases (on the reduced rent, but not the waived component) on a case by case basis and in light of the good faith criteria.
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.	There is no corresponding provision in the Act.	There appears to be a typographical error. It seems as though the wording should read: *"Landlords may not apply any prohibition OR levy any penalties…"* This is self-explanatory but clashes with Leasing Principle 2. It is not clear what prohibition there might be in a lease where a tenant fails to trade, but it is clear that a landlord cannot impose a penalty for non-trade by a tenant for any reason "due to the pandemic" which is quite broad and could potentially encompass reasons such as reduced foot traffic, illness or inability to hire staff or obtain stock. The Vic Regulations limit the operation of Leasing Principle 14 to the Relevant Period and state that a tenant under an eligible lease is not in breach of the lease if, *during the Relevant Period*, it reduces the opening hours or closes the premises and ceases to carry on business at the premises.

Western Australia

	Leasing Principles	Inconsistencies with or impacts on *Property Law Act 1969* (WA) or Regulations	Corrs comments
1.	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).	Section 81 of the Act precludes a landlord from re-entering or terminating a lease by forfeiture under a lease provision until after service of a notice on the tenant (except in the case of non-payment of rent unless the lease terms stipulate service of a notice must occur in this instance). The legislation provides the opportunity for a tenant to be given notice to rectify breaches for which a landlord may be able to terminate or re-enter the premises under the lease terms.	Leasing principle 1 provides further protection for tenants by prohibiting the termination of leases for non-payment of rent during the pandemic and recovery period. It effectively removes the right for a landlord to terminate without notice for non-payment of rent as preserved under section 129(8) of the Act. In addition, Leasing Principle 1 goes further than prohibiting termination rights under lease terms, and would be effective to prohibit a landlord's common law termination rights for repudiation and breach of essential term. Although the Code does not outline how long the prohibition will subsist for (being the pandemic period plus a reasonable subsequent recovery period), the Western Australian Government has provided for an initial 6 month period in the WA Act, being 30 March 2020 until 29 September 2020, which may be shortened or extended by regulation. The Code is also silent on whether landlords are able to take action for non-payment of rent breaches which arose prior to the commencement of the pandemic period. Additionally the Code and the WA Act are silent on what action a landlord can take and when that action can be taken for the non-payment of rent during the pandemic period, once the prohibition is lifted.
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.	There is no corresponding provision in the Act.	Leasing Principle 2 may preserve the right for a landlord to take action for breach of lease covenant, tenant repudiation or breach of essential term subject to Leasing Principle 1. This would be subject to Leasing Principle 14 (see below). The Leasing Principles do not consider obligations under leases for either party to carry out fitout works, capital works or expend other amounts of money during the pandemic and recovery period. Such obligations could have serious financial implications for either party in the context of these Leasing Principles generally.
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.	Section 73 of the Act states that where an actual waiver of the benefit of any covenant or condition in a lease on the part of a landlord is proven, that waiver will not be held: • to extend to any instance or any breach of covenant or condition other than that to which the waiver specifically relates; or • to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears.	Leasing Principle 3 requires a landlord to offer its tenant reductions in rent in the form of a waiver/deferral. As a tenant's payment of a reduced rent (or non-payment of rent) would otherwise be a breach of the lease, section 73 of the Act operates to maintain the landlord's rights in respect of other breaches of the lease by the tenant (where such rights cannot be exercised by a landlord due to the tenant's reduced rent or non-payment during the COVID-19 pandemic period (or reasonable subsequent recovery period)).

Western Australia			
	Leasing Principles	Inconsistencies with or impacts on *Property Law Act 1969* (WA) or Regulations	Corrs comments
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.		See comments on #3 above.
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.		See comments on #3 above.
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.	There is no corresponding provision in the Act.	This appears to be a straight pass through of any percentage reduction granted to the landlord, to corresponding amounts payable by the tenant.
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.	There is no corresponding provision in the Act.	This appears to be a straight pass through of any deferral period or percentage reduction granted to the landlord by a financier, to amounts payable by the tenant during the same period. The logical inference to be drawn is that this would apply to periodic payments of rent under the lease which would typically fund finance repayments, but this is not specified and the benefit could be interpreted to extend to encompass all amounts payable by the tenant under the lease (e.g. outgoings and other costs and charges whether periodic or not).

Western Australia

	Leasing Principles	Inconsistencies with or impacts on *Property Law Act 1969* (WA) or Regulations	Corrs comments
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.	There is no corresponding provision in the Act.	Unlike Leasing Principle 3, there is no prohibition on landlords taking action for non-payment of outgoings or other amounts (excluding rent) for tenants who are "able to trade" and Leasing Principle 2 would support this. However, the WA Act does prohibit landlords from taking action in respect of non-payment of any amount under the lease. The rationale appears to be that if a tenant is trading, it should contribute towards the landlord's costs of operating the building/centre. This would create a burden for a landlord where some tenants in a multi-tenanted building have chosen not to trade but operational services are still required (e.g. lifts, air conditioning, etc.). Leasing Principle 8 provides some relief to landlords by permitting them to reduce some services to reduce this burden.
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.	There is no corresponding provision in the Act.	Leasing Principle 9 contemplates that the parties will negotiate a plan for repayment of amounts owed by a tenant for a period after the pandemic ends (including a reasonable subsequent recovery period). There is no guidance on the timing of how long a repayment period could extend and a successful negotiation will depend on the individual circumstances. The impact of subsequent market conditions and how they will affect a negotiated repayment plan will not be known for some time.
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.	There is no corresponding provision in the Act.	Repayment plans negotiated with tenants cannot include interest charges on unpaid or deferred rent. Leasing Principle 10 does not specifically prohibit the application of interest to any unpaid outgoings or other costs and changes payable by a tenant under a lease.
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.	There is no corresponding provision in the Act.	This is self-explanatory but timing on when this can be effected and the recovery of which amounts is permitted once the prohibition is lifted is not clear.

Western Australia			
	Leasing Principles	Inconsistencies with or impacts on *Property Law Act 1969* (WA) or Regulations	Corrs comments
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.	There is no corresponding provision in the Act.	The logical inference is that the provisions of Part VII of the Property Law Act will apply to any extension of lease anticipated by Leasing Principle #2 so that all rights of the landlord are restored during the extension period. Landlords are required to negotiate extension terms and continue to lease to tenants whose trading may not have been strong even before the pandemic arose or who a landlord may not have otherwise chosen to re-lease the premises to in ordinary circumstances. Leasing Principle 12 effectively forces a landlord to tie up a property and continue to lease to an existing tenant beyond the term initially contemplated in the original lease. Some market distortion would be expected as a consequence in the pandemic recovery period. This may have an impact on market rents and property valuations.
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.	There is no corresponding provision in the Act.	Leasing Principle 13 is worded ambiguously ("landlords agree to a rent freeze") and appears to be a general prohibition on rent increases for all tenancies during the pandemic and recovery period. The WA Act introduces a moratorium on rent increases for all small commercial leases, irrespective of the trading strength of individual tenants with the burden of this and the impact on building valuations carried by all landlords. Again, this would create some market distortion.
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.	There is no corresponding provision in the Act.	There appears to be a typographical error. It seems as though the wording should read: *"Landlords may not apply any prohibition OR levy any penalties...* This is self-explanatory but clashes with Leasing Principle 2. It is not clear what prohibition there might be in a lease where tenant fails to trade, but it is clear that a landlord cannot impose a penalty for non-trade by a tenant for any reason "due to the pandemic" which is quite broad and could potentially encompass reasons such as reduced foot traffic, illness or inability to hire staff or obtain stock.

General comments:

- Section 20 of the Australian Consumer Law will continue to apply.
- Parties would need to consider the impact of these arrangements and any negotiated agreements on their successors in title (e.g. transferees of the landlord's interest in the land or the tenant's interest in the lease).
- The Leasing Principles are silent regarding costs of the parties, particularly in relation to recovery of costs by a landlord relating to breach by a tenant once the prohibitions are lifted.
- The Leasing Principles do not contemplate any provisions relating to actions by secured financiers, trustees in bankruptcy, receivers or managers or liquidators of tenants during the pandemic or recovery period.

Annexure 4: Application of Code to state retail tenancy legislation

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
1.	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).	Sections 6(1)(a) & (b) of the NSW Retail Regulation provide that landlords must not take any **prescribed action** against any **impacted lessee** during the **prescribed period** for a failure to pay rent and failure to pay outgoings. (See definitions of **prescribed action, impacted lessee** and **prescribed period** under General Comments below.) There is no corresponding provision in the RLA.	Although Leasing Principle 1 only sought to prohibit termination of a commercial lease for a breach for failure to pay rent, the NSW Retail Regulation has extended the prohibition to also prohibit termination for failure to pay outgoings. This is complementary and additional to other existing protections under the RLA against termination, e.g. section 58 which prohibits clauses permitting a landlord to terminate for failure to achieve sales or turnover performance.
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.	There is no specific provision in the RLA which corresponds with or contravenes this Leasing Principle 2. There is no specific provision in the NSW Retail Regulation that requires tenants to be committed to their lease terms to enjoy the protection under the NSW Retail Regulation however section 10 of the NSW Retail Regulation preserves the right for landlords to take action on grounds which are unrelated to the economic impact of the COVID-19 pandemic.	We do not expect that this Leasing Principle will be applied harshly against tenants in a way that neutralises the benefit of the legislative protections entirely however it is important to note that Landlords have retained their statutory and common law rights to take action including the ability to terminate Leases for tenant breaches which are not related to the pandemic emergency situation.
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.	Rent negotiation Section 7(4) of the NSW Retail Regulation specifies that a landlord cannot take or continue any prescribed action against an impacted lessee for a failure to pay rent during the prescribed period unless the landlord has first renegotiated the rent payable (and other terms) of a commercial lease having regard to: a. the economic impacts of the COVID-19 pandemic; and b. the leasing principles set out in the Code. There is no specific provision in the RLA which corresponds with or contravenes this Leasing Principle 2.	Rent negotiation Section 7(4) of the NSW Retail Regulation does not prevent the parties coming to an arrangement regarding the lease but is intended to incorporate Leasing Principle 3. The section contains a specific note requiring landlords to offer rent reductions in the form of waivers or deferrals of rent, proportionate to the impacted lessees' reductions in turnover under this section 7(4) of the NSW Retail Regulation. Section 7(2) permits either party to a commercial lease to request a renegotiation and under section (3), the other party is required to participate in that renegotiation in good faith. The section expands the scope of the renegotiations to include all other terms of a commercial lease in addition to rent.

New South Wales

Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
	Collection of tenant turnover information The RLA contains provisions governing the collection of turnover information including the following provision: *47 Information about turnover from online transactions* *(1) The tenant under a retail shop lease cannot be required to provide the landlord with information concerning the turnover of the business of the tenant that is turnover from online transactions, and a provision of the lease is void to the extent that it purports to require the provision of information concerning turnover from online transactions.* *(2) This section does not apply to information concerning turnover from online transactions where the goods or services concerned are delivered or provided from or at the retail shop (or the retail shopping centre of which the shop forms part) or where the transaction takes place while the customer is at the retail shop (whether or not the goods or services concerned are delivered from or at the retail shop).* Section 4(1)(b)(iii) of the NSW Retail Regulation specifically requires parties to take into account turnover of a business, including any turnover derived from internet sales of goods and services (see section 4(2)), to determine if a tenant is an impacted lessee. In addition, section 4(1)(b)(ii) contemplates that turnover for a tenant who is a corporation that is a member of a group will comprise the turnover of the group and not just the turnover relating to the relevant retail shop premises. Similarly, where a tenant is not a franchisee, the turnover for consideration is the turnover of the entire business conducted by the tenant and not just turnover attributable to the relevant retail shop premises.	**Collection of tenant turnover information** Section 4 of the NSW Retail Regulation sets out the criteria that a tenant must meet to qualify as an impacted lessee. As a landlord is not able to assess a tenant's standing on the basis of information that is ordinarily permitted to be required by a landlord under a retail shop lease, a tenant will need to effectively "volunteer" the online sales turnover information which is necessary for determining the criteria where the tenant is a member of a group or a business that operates in locations which extend beyond the relevant retail shop lease. In circumstances where it is is likely that tenants will shift their business model to incorporate more online sales during the pandemic and recovery period (e.g. restaurant deliveries) and where supply and/or delivery for a specific tenant may be moved to a centralised or offsite location, the NSW Retail Regulation temporarily adjusts the gap in the assessment of online turnover not previously captured under the RLA. The confidentiality provisions regarding turnover information in section 50 of the RLA still apply.

New South Wales			
	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
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.	There is no corresponding provision in the RLA which corresponds with or contravenes Leasing Principle 4. Section 7(4) of the NSW Retail Regulation requires the parties to a commercial lease to renegotiate the rent payable having regard to both the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code before a landlord takes or continues a prescribed action.	A landlord cannot take prescribed action against an impacted lessee until a renegotiation taking this Leasing Principle into account has taken place.
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.	There is no provision in the RLA which corresponds with or contravenes Leasing Principle 5. Section 7(4) of the NSW Retail Regulation requires the parties to a commercial lease to renegotiate the rent payable having regard to both the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code before a landlord takes or continues a prescribed action.	A landlord cannot take prescribed action against an impacted lessee until a renegotiation taking this Leasing Principle into account has taken place.
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.	Section 6(4) of the NSW Retail Regulation specifies that impacted lessees who are required to pay a fixed amount of the landlord's land tax, statutory charges or insurance and the amount payable by the landlord is reduced, the impacted lessee will be exempted from payment to the extent of the reduction. Section 29 of the RLA already provides for an adjustment in respect of overpayment of outgoings to ensure that a tenant is only liable to contribute an amount equal to the amount actually expended by the landlord in respect of those outgoings.	Leasing Principle 6 is not inconsistent with the RLA as the landlord is required to adjust the outgoings to the amount actually incurred by the landlord. Any reduction in statutory charges will be passed on in this respect.

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
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.	Section 24A of the RLA already prohibits a landlord from recovering interest or other charges incurred in respect of amounts borrowed by the landlord. There is no specific provision in the RLA which contravenes this Principle 7. Section 24A is complementary to Leasing Principle 7. There is no specific provision which incorporates this Leasing Principle 7 under the NSW Retail Regulation however, section 7(4) of the NSW Retail Regulation requires the parties to a commercial lease to renegotiate the rent payable having regard to both the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code before a landlord takes or continues a prescribed action.	It is interesting to note that a landlord is not permitted to on-charge interest and charges incurred by the landlord on borrowings but is required to share the benefits obtained from its deferral of loan any payments provided by a financial institution.
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.	There is no specific provision which incorporates this Leasing Principle 8 under the NSW Retail Regulation, however section 7(4) of the NSW Retail Regulation requires the parties to a commercial lease to renegotiate the rent payable and lease terms having regard to both the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code before a landlord takes or continues a prescribed action. The RLA already contains prescriptive provisions regarding recovery of outgoings and expenses from tenants. Section 12A of the RLA provides that a tenant is not liable to pay an outgoings amount unless it was disclosed in the disclosure statement issued prior to commencement of the lease. In addition, section 22 of the RLA proves that a tenant is not liable to pay outgoings unless the outgoings are recoverable under the RLA and details how those amounts will be determined, apportioned and recovered.	The relief available under Leasing Principle 8 applies to tenants who are "not able to trade" as distinct from tenants who are able to trade or who may be able to trade but choose not to. In addition, landlords should note that with respect to sections 12A and 22 of the RLA, any additional or new expenses attributable to landlords as a consequence of the pandemic (e.g. increased security measures) are not able to be passed on as they were not predicted or quantified prior to entry into the vast number of current leases. This is the case even if the additional cost items would benefit tenants in a centre who are not currently able to trade (e.g. protection of stock within premises).

New South Wales			
	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
	Landlords reserve the right to reduce services as required in such circumstances.	There is no specific provision in the NSW Retail Regulation which incorporates this Leasing Principle 8. Section 34 of the RLA provides a wide reaching regime for compensation to tenants where landlords take action which would disrupt or disturb tenants and which was not disclosed to tenants in sufficient detail before they entered into the lease.	It is extremely unlikely that disclosure relating to any leases which commenced prior to March 2020 would have contemplated the pandemic situation. In relation to reduction of services, landlords should consider their potential liability under section 34 where landlords are taking action that would attract a claim for compensation. Obvious examples include actions which reduce or limit traffic flow or inhibits access to premises (e.g. due to cleaning or sanitising arrangements). Despite this, section 34(4) of RLA does provide that a tenant will not be entitled to compensation for disturbance if the landlord closes the premises/centre for trading, provided: • the actions are a reasonable response to the COVID-19 pandemic as an emergency situation; or • a public/local authority has made orders affecting the premises/centre or prohibited trading from the premises/centre. In circumstances where a landlord is renegotiating lease terms prior to taking or continuing a prescribed action, those renegotiations may include a reduction in services in parallel with a reduction in rent.
.		Section 61 of the RLA prohibits landlords from changing core trading hours of a retail shopping centre except with approval from a majority of the retail shops in the centre.	A logical flow on from Leasing Principle 8 is that landlords may reduce services which could potentially limit the core trading hours within a retail shopping centre. There is conflict between a landlord's ability under Leasing Principle 8 to reduce services and the requirement to obtain approval to change core trading hours under section 61 of the RLA. Landlords may choose to consult with tenants regarding any changes to core trading hours and/or obtain the written approval of a majority of tenants.
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.	There is no provision in the RLA which corresponds with or contravenes Leasing Principle 9. Leasing Principle 9 is noted under section 7(4) of the NSW Retail Regulation, which requires parties to renegotiate commercial lease terms having regard to the leasing principles in the Code before a landlord takes or continues prescribed action.	Please also see our comments on Leasing Principle 12 below.

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
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.	The Tribunal has power under section 72A of the RLA to award the payment of interest at a specified rate on a successful claim.	There is no specific provision which incorporates this Leasing Principle 10 under the NSW Retail Regulation. However, this Leasing Principle 10 is noted under section 7(4) of the NSW Retail Regulation, which requires parties to renegotiate commercial lease terms having regard to the leasing principles in the Code before a landlord takes or continues prescribed action. It remains unclear in Leasing Principle 10 at what point in time interest for unpaid or overdue amounts previously deferred could or would become payable and are then not paid (i.e. after expiry of the recovery period) or when a claim could be made or an order for interest on such a claim could be sought.
		Section 45 of RLA allows landlords to recover expenses in connection with amendments to a lease requested by a tenant.	Despite the Leasing Principles being silent on costs of the parties, based on an over reading of the National Code of Conduct we expect that it is unlikely that the landlord will be able to charge the tenant for any costs/expenses of varying the lease under Leasing Principles 3, 4 & 5, even if a variation of the lease is requested by the tenant.
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.	Section 6(1)(a) of the NSW Retail Regulation specifies that landlords must not take any prescribed action, including recovery of part or whole of security bond, against any impacted lessee during the prescribed period for a failure to pay rent or outgoings or reduced opening hours of the premises. Part 2A of the RLA relates to security bonds and bank guarantees provided by tenants.	The NSW Retail Regulation has extended Leasing Principle 11 to prohibit a landlord drawing on a tenant's security for failure to pay outgoings or for a reduction in opening hours of the premises, in addition to the Code's prohibition on accessing a tenant's security for failure to pay rent. Security bonds are lodged with the Secretary of the Department of Industry, Skills and Regional Development and can only be withdrawn in accordance with Division 3 of Part 2A. Presumably, the Secretary will be disempowered from releasing bonds held during the pandemic and recovery period unless they are being returned to tenants. In the case of bank guarantees held by landlords, landlords should be mindful that current bank guarantees held may expire during any extension of the term of the lease. Leasing Principle 11 does not give landlords power to require replacement bank guarantees with later expiry dates or increased bank guarantees to cover deferred rental risk to be obtained and landlords would need to rely on lease terms in this regard. There would be costs to tenants to update bank guarantees with new expiry dates and tenants may experience difficulties or additional hurdles associated with finance arrangements (including the provision of bank guarantees) during periods of reduced trading.

New South Wales

	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
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.	The RLA requires landlords to give notice to tenants prior to expiry of a lease as to whether a tenant will be offered a renewal or extension of the lease or whether the landlord does not propose to offer an extension or further lease to the tenant. There is no specific provision which incorporates this Leasing Principle 12 under the NSW Retail Regulation. However, this Leasing Principle 12 is noted under section 7(4) of the NSW Retail Regulation, which requires parties to renegotiate commercial lease terms having regard to the leasing principles in the Code before a landlord takes or continues prescribed action.	A landlord's right to refuse to grant a further lease at expiry under section 44(1)(b) will be subject to the tenant's rights to an extension of the lease under Leasing Principle 12. In addition, tenants who may have wanted to walk away at the expiry of the lease term (e.g. retirees) may have no choice but to agree to trading for a longer period in order to repay deferred rents.
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.	Section 6(2) of the NSW Retail Regulation prohibits increases in rent payable by an impacted lessee during the prescribed period (this excludes rent or a component of rent which is determined by reference to turnover). Section 6(3) of the NSW Retail Regulation also prohibits landlords from taking any prescribed action against an impacted lessee after the prescribed period as a result of a breach due to failure to pay the rent increase amount referred to in section 6(2). Section 18 of the RLA includes restrictions on how base rent under a retail lease can be adjusted, including the ability for rent to decrease on a market review and how often rent can be adjusted.	Interestingly, under the NSW Retail Regulation, landlords are not prohibited from enforcing increases to percentage rent or the lowering of a percentage rent threshold. The NSW Retail Regulation prohibits landlords from delaying any action until after the prescribed period in order to recover increases in rent which would otherwise have been payable during the prescribed period. If the parties enter into an extension and/or variation of lease, section 18 of the RLA would continue to apply with respect to rent reviews during both the pandemic and recovery periods and subsequently.
14.	Landlords may not apply any prohibition [or] levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.	Section 6(1)(c) of the NSW Retail Regulation provides that landlords must not take any prescribed against an impacted lessee during the prescribed period if the impacted lessee does not open for business during the required trading hours under the commercial lease. Section 46 of the RLA prevents a retail shop lease from requiring a tenant to trade when trading is unlawful.	Leasing Principle 14 will not permit landlords to imposing punitive charges on tenants who are in breach of lease obligations to trade. This is despite Leasing Principle 2 which upholds the requirement for tenants to comply with their lease provisions. In addition, if a tenant is not permitted to trade as required by law due to COVID-19, any provisions under the lease requiring the tenant to trade in those circumstances will be void under section 46 of RLA.
	Other provisions to note – unconscionable conduct:	The RLA incorporates the unconscionable conduct provisions from the Australian Consumer Law with respect to unconscionable conduct and misleading and deceptive conduct.	Landlords and tenants should be mindful of the unconscionable conduct provisions in the RLA when negotiating arrangements under the Leasing Principles.

New South Wales

Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
Amendments to RLA	The RLA provides for the power to make regulations for the purposes of responding to the public health emergency caused by the COVID-19 pandemic: (a) prohibiting the recovery of possession of premises by a landlord or owner of premises or land from a tenant or tenant of the premises or land under the relevant Act in particular circumstances, (b) prohibiting the termination of a lease or tenancy by a landlord or owner of premises or land under the relevant Act in particular circumstances, (c) regulating or preventing the exercise or enforcement of another right of a landlord or owner of premises or land under the relevant Act or an agreement relating to the premises or land in particular circumstances, (d) exempting a lessee or tenant, or a class of lessees or tenants, from the operation of a provision of the relevant Act or any agreement relating to the leasing or licensing of premises or land.	New section 87 in response to COVID-19 pandemic. NSW Retail Regulations made pursuant to this emergency provision.
Other provisions to note – binding mediation under Code of Conduct Where landlords and tenants cannot reach agreement on leasing arrangements (including 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.	Section 8 of the NSW Retail Regulation clarifies that Part 8 of the RLA extends to an impacted commercial lease dispute as if it were a retail tenancy dispute. Section 8(2) of the NSW Retail Regulation defines **impacted commercial lease** dispute as any dispute concerning the liabilities or obligations (including any obligation to pay money) under a commercial lease to which an impacted lessee is a party, being liabilities or obligations which arose under the commercial lease concerning circumstances occurring during the prescribed period and includes a dispute regarding a renegotiation (or a failure to take part in a renegotiation) of rent payable under the commercial lease under clause 7. Part 8 of the RLA regarding dispute resolution applies with respect to failure of the parties to reach agreement.	Compulsory mediation of disputes and jurisdictional limits on claims to the Tribunal will continue to apply.

New South Wales		
Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 1994* (NSW) (RLA) or the NSW Retail Regulation	Corrs comments
Other provisions to note – disclosure statements	Landlords are required to issue disclosure statements under Part 2 of the RLA. Tenants are entitled to compensation for pre-lease misrepresentations regarding information in the disclosure statement.	Landlords should take care with respect to statements in disclosure statements when issuing disclosure statements at a point in time before the NSW Retail Regulation was finalised with respect to the Leasing Principles and where the pandemic emergency is ongoing. The Leasing Principles do not contemplate relief for landlords with respect to their disclosure and other obligations under the RLA during the emergency and recovery period.
Other provisions to note – alterations and other interference with the shop	Under Part 4 of the RLA, landlords are required to give notice regarding alterations and refurbishment and tenants are entitled to seek compensation for disturbance. The relocation provisions in section 34A will also apply.	Landlords will still need to comply with these provisions unless an alteration is necessitated by an emergency and the maximum period of notice that is reasonably practicable in the circumstances has been given. Alterations made during the pandemic and recovery period should be considered in the context of these requirements. Relocation of tenants will need to be carried out in accordance with the requirements of section 34A of the RLA with a minimum of 3 months' notice.

General comments regarding the Leasing Principles and NSW Legislation

Retail Leases Act 1994 (NSW) (RLA)

- Our comments in relation to the application of the Leasing Principles to the Conveyancing Act apply to leases within the scope of the RLA.
- The RLA applies to agreements for lease as well as leases (section 3B).
- The RLA does not apply to short term leases of less than 6 months without any right for the tenant to extend the term (section 6A)

Retail and Other Commercial Leases NSW Retail Regulation 2020 (NSW Retail Regulation)

- The NSW Retail Regulation commenced on 24 April 2020 is made under section 85 and section 87 of the RLA . The NSW Retail Regulation will operate for a prescribed period of 6 months from the date of commencement (that is, until **23 October 2020**). It is assumed that the prescribed period includes any "subsequent recovery period" mentioned under the Code as the NSW Retail Regulation has not specifically referred to any other period comprising this period.

- Under the NSW Retail Regulation:
  - **commercial lease** means retail shop lease, but does not include the following—
    - a lease entered into after the commencement of the NSW Retail Regulation, but not a lease entered into by means of an option to extend or renew the lease or any other extension or renewal of an existing lease on the same terms as the existing lease,
    - a lease under the Agricultural Tenancies Act 1990,
    - a commercial lease within the meaning of Schedule 5 to the Conveyancing (General) NSW Retail Regulation 2018.
  - **prescribed action** means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal for any of the following—
    - eviction of the tenant from premises or land the subject of the commercial lease,
    - exercising a right of re-entry to premises or land the subject of the commercial lease,
    - recovery of the premises or land,
    - distraint of goods,
    - forfeiture,
    - damages,
    - requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a tenant,
    - recovery of the whole or part of a security bond under the commercial lease,
    - performance of obligations by the tenant or any other person pursuant to a guarantee under the commercial lease,
    - possession,
    - termination of the commercial lease,
    - any other remedy otherwise available to a landlord against a tenant at common law or under the law of this State.
  - **prescribed period** means the period ending at the end of the day that is 6 months after the day on which this NSW Retail Regulation commences.
  - Section 4 of the NSW Retail Regulation defines an **"impacted lessee"** as follows:

    *"(1) A lessee is an **impacted lessee** if—*

    (a) the lessee qualifies for the JobKeeper Scheme under sections 7 and 8 of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 of the Commonwealth, and

    (b) the following turnover in the 2018–2019 financial year was less than $50 million—

    (i) if the lessee is a franchisee—the turnover of the business conducted at the premises or land concerned,

    (ii) if the lessee is a corporation that is a member of a group—the turnover of the group,

    (iii) in any other case—the turnover of the business conducted by the lessee.

    *(2) To avoid doubt, in this clause, **turnover** of a business includes any turnover derived from internet sales of goods or services.*

    *(3) In this clause, corporations constitute a **group** if they are related bodies corporate within the meaning of the Corporations Act 2001 of the Commonwealth."*

- An act or omission of a tenant required under a federal or state law in response to the COVID-19 pandemic is taken not to amount to breach of a commercial lease, and does not constitute grounds for termination of the lease or the taking of any prescribed action by the landlord against the tenant (section 6(5) of the NSW Retail Regulation). Although not specified within the NSW Retail Regulation, it is assumed that this extends beyond the prescribed period. Nonetheless parties should ensure that any release from liability with respect to such actions or omissions should be recorded in any renegotiated commercial lease terms.
- Landlords and tenants (including impacted lessees) may agree to take any action in relation to a commercial lease, including the landlord taking any prescribed action or parties agreeing to terminate the commercial lease (section 6(6) of the NSW Retail Regulation).
- Nothing in the NSW Retail Regulation prevents a landlord from taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic (section 10 of the NSW Retail Regulation). Nonetheless, landlords should carefully consider whether and how they take any prescribed action against an impacted lessee for a previous failure to pay rent or for any other breach, as it is arguable that the economic impacts from COVID-19 may have been caused by a variety of factors either occurring individually or in a compounding way including ability to source stock, ability to obtain finance, health of employees, etc.
- The Tribunal or any court must have regard to the Code when considering whether to make a decision or order relating to a landlord's recovery of possession of premises or land, termination of commercial lease, or exercise or enforcement of another right held by the landlord (section 9 of the NSW Retail Regulation), and the rules of equity and of common law are preserved in this regard (section 11 of the NSW Retail Regulation).

Queensland

	Leasing Principles	Inconsistencies with or impacts on *Retail Shop Leases Act 1994* (Qld) (RSLA) or Regulations	Corrs comments
1.	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).	There is no corresponding provision in the RSLA.	This protection is reflected in the Qld Regulation. This is complementary and additional to other existing protections under the RSLA against termination. However, the protection afforded by the Qld Regulation will not apply: • if the landlord has made a genuine attempt to negotiate the rent payable by the tenant and the tenant has substantially failed to comply with the tenant's obligations relating to negotiation of rent under the Qld Regulation; or • the reason for the non-payment of rent by the tenant is not related to the effects of COVID-19.
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.		There is no specific provision in the RSLA which contravenes this Leasing Principle 2.
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.	Unlike NSW, there is no provision in the RSLA prohibiting the landlord from requiring turnover information of the business from online transactions. The formula for calculating the turnover rent must be specified in the lease (section 25 of the RSLA).	It is likely that tenants will shift their business model to incorporate more online sales during the pandemic and recovery period (e.g. restaurant deliveries). Under the Qld Regulation, the assessment of an entity's turnover includes online sales. The variation/lease should clearly specify how the rent will be determined. The confidentiality provisions regarding turnover information in section 26 of the RSLA still apply. Landlords also have an obligation under the Qld Regulation to keep any financial and turnover information provided by a tenant confidential.
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.	There is no corresponding provision in the RSLA.	There is no specific provision in the RSLA which contravenes this Principle 4.

Queensland			
	Leasing Principles	Inconsistencies with or impacts on *Retail Shop Leases Act 1994* (Qld) (RSLA) or Regulations	Corrs comments
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.	There is no corresponding provision in the RSLA.	There is no specific provision in the RSLA which contravenes this Principle 5.
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.	Land tax is not an outgoing that is recoverable from a tenant (section 7(3) of the RSLA).	There is no specific provision in the RSLA which contravenes this Principle 6.
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.	Section 24 of the RSLA provides that the lease must not contain a provision requiring the tenant to make any payment other than rent, outgoings and certain other payments specified in that section. Outgoings is defined in section 7 to exclude payment of interest and charges on amounts borrowed by the landlord.	There is no specific provision in the RSLA which contravenes this Principle 7. Section 24 is complementary to Leasing Principle 7. It is interesting to note that a landlord is not permitted to on-charge interest and charges incurred by the landlord on borrowings but is required to share the benefits obtained from its deferral of loan any payments provided by a financial institution.
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.	The RSLA already contains prescriptive provisions regarding recovery of outgoings and expenses from tenants. Section 37 of the RSLA provides that a tenant is not liable to pay outgoings unless the lease specifies how the outgoings will be determined, apportioned and recovered.	The relief available under Leasing Principle 8 applies to tenants who are "not able to trade" as distinct from tenants who are able to trade or who may be able to trade but choose not to.
	Landlords reserve the right to reduce services as required in such circumstances.	Section 43 of the RSLA provides a wide reaching regime for compensation to tenants where landlords take action which would disrupt or disturb tenants.	In relation to reduction of services, landlords should consider their potential liability under section 43 where landlords are taking action that would attract a claim for compensation. Obvious examples include actions which reduce or limit traffic flow or inhibits access to premises (e.g. due to cleaning or sanitising arrangements). Despite this, section 43AB of the RSLA does provide that a tenant will not be entitled to compensation for disturbance if the landlord takes action in compliance with an duty imposed under an Act or resulting from a requirement imposed by any entity acting under the authority of an Act , which would include the Qld Regulation.
		Sections 51 and 52 of the RSLA provide that the core trading hours of a retail shopping centre cannot be changed except by way of a resolution voted upon by a least 50% of the tenants and supported by 75% of those who voted.	A logical flow on from Leasing Principle 8 is that landlords may reduce services which could potentially limit the core trading hours within a retail shopping centre. There is conflict between a landlord's ability under Leasing Principle 8 to reduce services and the requirement to for a resolution to approve a change to core trading hours under sections 51 and 52 of the RSLA. Landlords may choose to consult with tenants regarding any changes to core trading hours and/or obtain the required resolution.

Queensland

	Leasing Principles	Inconsistencies with or impacts on *Retail Shop Leases Act 1994* (Qld) (RSLA) or Regulations	Corrs comments
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.	There is no corresponding provision in the RSLA.	There is no specific provision in the RSLA which contravenes this Principle 9. Please see our comments on Leasing Principle 12 below.
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.	The orders that QCAT may make under section 83 of the RSLA include an order requiring a party to pay an amount including compensation.	Consideration will need to be given at what point in time interest for unpaid or overdue amounts previously deferred could or would become payable and are then not paid (i.e. after expiry of the recovery period) or when a claim could be made or an order for interest on such a claim could be sought.
		Section 24(1)(c) of RSLA allows landlords to recover expenses in connection with amendments to a lease requested by a tenant.	Despite the Leasing Principles being silent on costs of the parties, based on an over reading of the National Code of Conduct we expect that it is unlikely that the landlord will be able to charge the tenant for any costs/expenses of varying the lease under Leasing Principles 3, 4 & 5, even if a variation of the lease is requested by the tenant.
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.	There is no corresponding provision in the RSLA.	The Qld Regulation allows a landlord to retain a security deposit (e.g. a bank guarantee) for any period following the expiration of a lease during which the tenant is paying deferred rent. The landlord will be able to call on the security deposit in accordance with the terms of the lease immediately prior to the expiration of the lease. Landlords should be mindful that current bank guarantees held may expire during any extension of the term of the lease, or during a payment period of deferred rent which extends beyond the term of the lease. Leasing Principle 11 or the Qld Regulation do not give landlords the power to require replacement bank guarantees with later expiry dates or increased bank guarantees to cover deferred rental risk to be obtained and landlords would need to rely on lease terms in this regard. There would be costs to tenants to update bank guarantees with new expiry dates and tenants may experience difficulties or additional hurdles associated with finance arrangements (including the provision of bank guarantees) during periods of reduced trading.

Queensland

	Leasing Principles	Inconsistencies with or impacts on *Retail Shop Leases Act 1994* (Qld) (RSLA) or Regulations	Corrs comments
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.	Section 46AA of the RSLA requires landlords to give notice (where the lease does not contain an option) to tenants prior to expiry of a lease as to whether a tenant will be offered a renewal or extension of the lease or whether the landlord does not propose to offer an extension or further lease to the tenant.	A landlord's right to refuse to grant a further lease at expiry under section 46AA will be subject to the tenant's rights to an extension of the lease under Leasing Principle 12. The exceptions to the landlord's obligation to offer an extension of the lease under the Qld Regulation should be taken into account. In addition, tenants who may have wanted to walk away at the expiry of the lease term (e.g. retirees) may have no choice but to agree to trading for a longer period in order to repay deferred rents.
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.	Sections 27 of the RSLA includes restrictions on how base rent under a retail lease can be adjusted including the ability for rent to decrease on a market review and how often rent can be adjusted.	If the parties enter into an extension and/or variation of lease, sections 27 of the RLA would continue to apply with respect to rent reviews during both the pandemic and recovery periods and subsequently.
14.	Landlords may not apply any prohibition [or] levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.	There is no corresponding provision in the RSLA.	Leasing Principle 14 will not permit landlords to imposing punitive charges on tenants who are in breach of lease obligations to trade.
	Other provisions to note – unconscionable conduct:	Section 46A of the RSLA imposes an obligation on both landlords and tenants to not engage in conduct that is unconscionable.	Landlords and tenants should be mindful of the unconscionable conduct provisions in the RSLA when negotiating arrangements under the Qld Regulation.

Queensland

Leasing Principles	Inconsistencies with or impacts on *Retail Shop Leases Act 1994* (Qld) (RSLA) or Regulations	Corrs comments
Regulation making power	Under the *COVID-19 Emergency Response Act 2020* (Qld), a regulation may be made under that Act or the RSLA, for responding to COVID-19 emergency: (a) prohibit the recovery of possession of premises by a landlord from a tenant; (b) prohibit the termination of a lease by a landlord; (c) regulate or prevent the exercise or enforcement of another right of a landlord of premises under a lease or other agreement relating to the premises; (d) exempt a tenant, or a class of tenants, from the operation of a provision of an Act, lease or other agreement relating to the leasing of premises; (e) require parties to a lease to have regard to particular matters or principles, or a prescribed standard, code or other document, in negotiating or disputing a matter under or in relation to the lease; (f) require a mediator, conciliator, arbitrator, tribunal, court or other decision-maker to have regard to particular matters or principles, or a prescribed standard, code or other document, in mediating, conciliating, hearing or deciding a matter relating to a lease; and (g) provide for a dispute resolution process for disputes relating to leases.	New section 87 in response to COVID-19 pandemic.
Other provisions to note – disclosure statements	Landlords are required to issue disclosure statements under Part 5 of the RSLA. Tenants are entitled to compensation for disclosure statements that contain information that is false or misleading in a material particular and also under section 43AA for false or misleading statement or misrepresentation made by the landlord when the tenant entered into the lease.	The Qld Regulations provide that Part 5 of the RSLA does not apply to a variation of lease agreed under the Qld Regulation.
Other provisions to note –interference with the shop	The relocation provisions in section 46D to 46G will also apply.	Relocation of tenants will need to be carried out in accordance with the requirements of sections 46D to 46G of the RSLA with a minimum of 3 months' notice.

Victoria

	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 2003* (Vic) (RLA) or Regulations	Corrs comments
1.	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).	There is no corresponding provision in the RLA.	Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	There is no corresponding provision in the RLA.	There is no specific provision in the RLA which contravenes this Principle 2. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	Unlike NSW, there is no provision in the Victorian RLA prohibiting the landlord from requiring information concerning the turn of the business form online transactions. Rent calculated by reference to turnover are permitted provided *"the lease specifies how the rent is to be determined"* (section 33 of the RLA). If the lease doesn't specify how it will be determined the RLA includes a process requiring the parties to agree in writing or, failing that, for a specialist retail valuer to be appointed.	It is likely that tenants will shift their business model to incorporate more online sales during the pandemic and recovery period (e.g. restaurant deliveries). The variation / lease should clearly specify how the rent will be determined. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	There is no corresponding provision in the RLA.	There is no specific provision in the RLA which contravenes this Principle 4. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	There is no corresponding provision in the RLA.	There is no specific provision in the RLA which contravenes this Principle 5. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.

Victoria			
	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 2003* (Vic) (RLA) or Regulations	Corrs comments
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.	Section 48 of the RLA already provides for an adjustment in respect of any overpayment of underpayment of outgoings by a tenant. It does not specifically require a landlord to pass on any reduction in outgoings.	Leasing Principle 6 is not inconsistent with the RLA as the landlord is required to adjust the outgoings to the amount actually incurred by the landlord. Any reduction in statutory charges will be passed on in this respect. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	Section 44 of the RLA provides that *A provision in a retail premises lease is void to the extent that it requires the tenant to pay an amount in respect of interest or other charges incurred by the landlord in respect of amounts borrowed by the landlord.*	There is no specific provision in the RLA which contravenes this Principle 7. Section 44 is complementary to Leasing Principle 7.It is interesting to note that a landlord is not permitted to on-charge interest and charges incurred by the landlord on borrowings but is required to share the benefits obtained from its deferral of loan any payments provided by a financial institution. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	Sections 20 and 39 of the RLA prevents a landlord recovering from a tenant outgoings and costs associated with the fit out of retail premises unless: • the tenant's liability to make such payments; and • in the case of outgoings, how the outgoings will be determined and apportioned between tenants, has been clearly disclosed in a disclosure statement given to the tenant.	The impact of sections 20 and 39 of the RLA is that any additional or new expenses incurred by landlords as a consequence of the pandemic (e.g. increased security measures) are unlikely to be able to be passed on as they were not predicted or quantified prior to entry into the current leases unless the variation constitutes a surrender and re-grant triggering the need to provide a new disclosure statement and those new charges are disclosed in that disclosure statement. This is the case even if the additional cost items would benefit tenants in a centre who are not currently able to trade (e.g. protection of stock within premises). Notwithstanding the above, as the Vic Regulations require "all the circumstances of the eligible lease" to be taken into account when determining the level of rent relief to be offered to tenants (including a landlord's financial ability to offer rent relief) it will be open to landlords to factor additional costs into the rent relief being offered to tenants.

Victoria

Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 2003* (Vic) (RLA) or Regulations	Corrs comments
	Section 54 of the RLA requires a landlord to compensate a tenant for loss or damage suffered by the tenant due to the landlord: • substantially inhibiting the tenant's access to the premises; • unreasonably taking action that causes substantial disruption to the tenant's trading; • fails to rectify as soon as possible breakdown of plant and equipment or a defect in the premises or building; • neglects to adequately clean, maintain or repair the building. The section does not apply to action taken by a landlord as a reasonable response to an emergency. Regulation 14 of the Vic Regulations provides that *"if a tenant under an eligible lease is not able to operate their business at the premises for any part of the relevant period, the landlord may cease to provide, or reduce provision of, any service at the premises as is reasonable in the circumstances and in accordance with any reasonable request of a tenant"*	In relation to reduction of services, landlords should consider their potential liability under section 54 however noting that section 54(4) of RLA provides that a tenant will not be entitled to compensation for disturbance if the landlord closes the premises/centre for trading, provided: • the actions are a reasonable response to the COVID-19 pandemic as an emergency situation; or • a public/local authority has made orders affecting the premises/centre or prohibited trading from the premises/centre. Landlords can also take comfort from Regulation 14 of the Vic Regulations which allows for services to be reduced / ceased where tenants are unable to trade from the premises and have requested the reduction. Given the close relationship between the level of services offered and the outgoings incurred we suspect tenants who are not trading will be keen for services to be reduced. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
	Section 66 of the RLA provides if a lease requires a tenant to remain open for trade during the core trading hours of a retail shopping centre, a landlord cannot change the core trading hours unless agreed to by a majority of tenants.	A logical flow on from Leasing Principle 8 is that landlords may reduce services which could potentially limit the core trading hours within a retail shopping centre. There is conflict between a landlord's ability under Leasing Principle 8 to reduce services and the requirement to obtain approval to change core trading hours under section 66 of the RLA. Landlords may choose to consult with tenants regarding any changes to core trading hours and/or obtain the written approval of a majority of tenants. Orders made under the Public Health and Wellbeing Act 2008 will likely assist. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.

Victoria			
	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 2003* (Vic) (RLA) or Regulations	Corrs comments
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.	No corresponding provision in the *Retail Leases Act 2003* (Vic).	There is no specific provision in the RLA which contravenes this Principle 9. Please see our comments on Leasing Principle 12 below as well as our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	The prohibition in section 51 of the RLA on a landlord recovering costs associated with *"the negotiation, preparation or execution of the lease"* does not specifically prohibit a landlord recovering costs associated with the preparation of an amendment to lease or extension of lease.	Despite the Leasing Principles being silent on costs of the parties, based on ourreading of the National Code of Conduct we expect that it is unlikely that the landlord will be able to charge the tenant for any costs/expenses of varying the lease under Leasing Principles 3, 4 & 5, even if a variation of the lease is requested by the tenant. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
		Section 91 of the RLA provides that in ordering the payment of a sum of money by a party the Tribunal may order the payment of interest on that sum.	The Tribunal's power to award interest is in conflict with Leasing Principle 9 to the extent that it is unclear in Leasing Principle 9 at what point in time interest for unpaid or overdue amounts previously deferred becomes payable and are then not paid (i.e. after expiry of the recovery period). Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	Section 24 of the RLA deals with security deposits and section 23(3)(e) deals with securing the performance of the tenant's obligations under the lease.	Security bonds must be held by the landlord on behalf of the tenant in an interest-bearing account in accordance with section 24 of the RLA. The landlord must account to the tenant for interested earned on the deposit but is entitled to keep the interest. In the case of bank guarantees held by landlords, landlords should be mindful that current bank guarantees held may expire during any extension of the term of the lease. Leasing Principle 11 does not give landlords power to require replacement bank guarantees with later expiry dates or increased bank guarantees to cover deferred rental risk.Landlords would need to rely on lease terms in this regard. There would be costs to tenants to update bank guarantees with new expiry dates and tenants may experience difficulties or additional hurdles associated with finance arrangements (including the provision of bank guarantees) during periods of reduced trading. As outlined in Annexure 3, the Vic Regulations clarify that it is open to the parties to agree to not extend the term of the lease.

Victoria			
	Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 2003* (Vic) (RLA) or Regulations	Corrs comments
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.	Section 64 of the RLA provides that, if the tenant does not have an option to renew the lease for a further term, the landlord must give a notice to the tenant offering to renew lease or advising the tenant that the landlord does not propose renewing the lease. This notice must be given at least 6 months but no more than 12 months before the end of the lease.	A landlord's right to refuse to grant a further lease at expiry under section 64(2)(b) will be subject to the tenant's rights to an extension of the lease under Leasing Principle 12. As outlined in Annexure 3, the Vic Regulations clarify that it is open to the parties to agree to not extend the term of the lease.
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.	No corresponding provision in the RLA.	Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.
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.	No corresponding provision in the RLA.	Leasing Principle 14 will not permit landlords to charge levies or penalties on tenants who are in breach of lease obligations to trade. Please see our comments in Annexure 3 regarding the relationship between the Code and the Vic Regulations.

Victoria

Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 2003* (Vic) (RLA) or Regulations	Corrs comments
Other provisions to note – unconscionable conduct:	The RLA provides: ***77 Unconscionable conduct of a landlord*** *(1) A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.* *(2) Without limiting the matters to which the Tribunal may have regard for the purpose of determining whether a landlord has contravened subsection* *(1), the Tribunal may have regard to—* *(a) the relative strengths of the bargaining positions of the landlord and tenant; and* *(b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the landlord's legitimate interests; and* *…* *(e) the amount for which, and the circumstances under which, the tenant could have acquired an identical or equivalent lease from a person other than the landlord; and* *(f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants; and* *(g) the requirements of any applicable industry code; and* *…* *(k) the extent to which the landlord acted in good faith; and* ***78 Unconscionable conduct of a tenant*** *(1) A tenant under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.*	Landlord and tenant should be mindful of the unconscionable conducts provisions in the RLA when negotiating arrangements under the Leasing Principles.

Victoria		
Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 2003* (Vic) (RLA) or Regulations	Corrs comments
	(2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a tenant has contravened subsection (1), the Tribunal may have regard to— *(a) the relative strengths of the bargaining positions of the tenant and landlord; and* *(b) whether, as a result of conduct engaged in by the tenant, the landlord was required to comply with conditions that were not reasonably necessary for the protection of the tenant's legitimate interests; and* *…* *(e) the amount for which, and the circumstances under which, the landlord could have granted an identical or equivalent lease to a person other than the tenant; and* *…*	
Other provisions to note – binding mediation	***87 Retail tenancy disputes must first be referred for alternative dispute resolution*** *(1) A retail tenancy dispute may only be the subject of proceedings before the Tribunal (whether under this Act, the Fair Trading Act 1999 or any other Act) if the Small Business Commission has certified in writing that mediation or another appropriate form of alternative dispute resolution under this Part has failed, or is unlikely, to resolve it.* *(2) This section does not apply to proceedings for an order in the nature of an injunction.* *(3) This section does not affect the validity of any decision made by the Tribunal.* ***35 Rent reviews generally*** *(1) If a retail premises lease provides for a review of the rent payable under the lease or under a renewal of the lease, the lease must state—* *(a) when the reviews are to take place; and* *(b) the basis or formula on which the reviews are to be made.*	The position under section 87 of the RLA is reflected under the Vic Regulations which require "eligible lease disputes" to be referred to the Small Business Commission before they are the subject of formal proceedings before VCAT or a court. Regulation 23 expressly provides that an eligible lease dispute may only be the subject of a proceeding in VCAT or a court (other than the Supreme Court) is the Small Business Commission has certified in writing that mediation has failed.

Victoria		
Leasing Principles	Inconsistencies with or impacts on *Retail Leases Act 2003* (Vic) (RLA) or Regulations	Corrs comments
	(2) The basis or formula on which a rent review is to be made must be one of the following— *(a) a fixed percentage;* *(b) an independently published index of prices or wages;* *(c) a fixed annual amount;* *(d) the current market rent of the retail premises;* *(e) a basis or formula prescribed by the regulations.* *(3) A provision in a retail premises lease is void to the extent that it purports to preclude, or prevents or enables a person to prevent, the reduction of the rent or to limit the extent to which the rent may be reduced.* *…* *(6) A rent review provision in a retail premises lease is void if the lease does not specify how the review is to be made.*	If the parties enter into an extension and/or variation of lease, section 35 of the RLA would continue to apply with respect to rent reviews during both the pandemic and recovery periods and subsequently.
Other provisions to note – disclosure statements	Unser section 17 of the RLA, the landlord must provide the Disclosure Statement at least 7 days before the parties enter into the lease. If any of the information is misleading, the tenant may give the landlord a written notice of termination.	Landlords should take care when varying leases to ensure disclosure statements are issued when the variation constitutes a surrender and re-grant of the lease.
Other provisions to note – alterations and other interference with the shop	Under Part 6 of the RLA, landlords are required to give notice and tenants can seek reasonable compensation for disturbances. The relocation provisions in section 55 will also apply.	Landlords will still need to comply with these provisions even if alternations unless an alteration is necessitated by an emergency and the maximum period of notice that is reasonably practicable in the circumstances has been given. Alterations made during the pandemic and recovery period should be considered in the context of these requirements. Relocation of tenants will need to be carried out in accordance with the requirements of section 34A of the RLA with a minimum of 3 months' notice.

Other comments and considerations

- The RLA applies to agreements for lease as well as leases (see definition of lease).
- The RLA does not apply to short term leases of less than 12 months without any right for the tenant to extend the term (section 12).

	Western Australia		
	Leasing Principles	Inconsistencies with or impacts on *Commercial Tenancies (Retail Shops) Agreements Act 1985* (WA) (RSA) or Regulations	Corrs comments
1.	Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).	There is no corresponding provision in the RSA.	There is no specific provision in the RSA which contravenes this principle. The principle is complementary and is consistent with the purpose of the RSA to prohibit unconscionable conduct.
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.	There is no corresponding provision in the RSA.	There is no specific provision in the RSA which contravenes this leasing principle. It is unclear what "material failure to abide by substantive terms" of a lease includes. Disappointingly, neither the WA Act, WA Regulations or WA Code includes an obligation on tenants to remain committed to their leases. As a result it appears that in WA landlords are effectively prevented from terminating leases or drawing on securities where tenants commit material breaches such as abandoning the premises and stopping rent payments.
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.	The RSA contains provisions governing turnover rent, including s 7 which states: *"(1) Without limiting subsection (2)(a), where a retail shop lease contains a provision to the effect that the rent is to be determined either in whole or in part by reference to the turnover of the business and —* *(a) the tenant did not, by notice in writing in the prescribed form given to the landlord before the provision was included in the lease, elect that the rent should be so determined; and* *(b) the tenant, by notice in writing given to the landlord, objects to the rent being so determined, the provision is void as from the day on which the notice referred to in paragraph (b) is given.*	Section 7 of the RSA applies where rent is to be determined by turnover. Usually turnover rent is charged in addition to a base rent sum. However, there is a risk that the section may apply where the base rent is being reduced by reference to the tenant's turnover. Landlords should be careful to ensure that they comply with the section or otherwise agree and specify the figure for the reduced rent in writing with the tenant.

Western Australia		
Leasing Principles	Inconsistencies with or impacts on *Commercial Tenancies (Retail Shops) Agreements Act 1985* (WA) (RSA) or Regulations	Corrs comments
	(2) Where a retail shop lease contains a provision to the effect that the rent is to be determined either in whole or in part by reference to the turnover of the business — *(a) that provision is void if the lease does not specify the formula by which the amount of the rent is to be determined; and* *(b) unless by reason of this section that provision is void, the lease shall be taken to provide that the tenant shall furnish to the landlord —* *(i) not later than 14 days after the end of each month in respect of which the rent or any of the rent is to be so determined or at such other times as are agreed between the parties, a statement in writing specifying the turnover of the business during that month; and* *(ii) not later than 42 days after the end of each calendar year, or each financial year of the business, during which the rent or any of the rent is to be so determined or at such other times as are agreed between the parties, and at the termination of the lease, a statement of the turnover of the business certified by an accountant to truly and accurately represent the turnover of the business during the last preceding year or, where the lease has terminated other than at the end of a year, during the part of that year before which the lease terminated.*	

	Western Australia		
	Leasing Principles	Inconsistencies with or impacts on *Commercial Tenancies (Retail Shops) Agreements Act 1985* (WA) (RSA) or Regulations	Corrs comments
		(3) Where the tenant under a retail shop lease furnishes to the landlord statements in accordance with subsection (2)(b)(i) and *(ii) in respect of a period he shall be taken to have satisfied any obligation under the lease to provide turnover figures or statements in relation to the business in respect of that period but shall, at the request of the landlord, permit an accountant engaged by the landlord to carry out an audit of those turnover figures at the cost of the landlord and shall reimburse the landlord for the cost of the audit if the audit discloses that the statement furnished under subsection (2)(b)(ii) understated the turnover of the business during the relevant period by more than 5%….* *(5) Where by reason of this section, a provision of a retail shop lease to the effect that rent is to be determined either in whole or in part by reference to the turnover of the business is void, the rent shall be as is agreed in writing between the parties or determined by the Tribunal."*	
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.	There is no corresponding provision in the RSA.	There is no specific provision in the RSA which contravenes this Principle 4.
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.	There is no corresponding provision in the RSA.	There is no specific provision in the RSA which contravenes this Principle 5.

	Western Australia		
	Leasing Principles	Inconsistencies with or impacts on *Commercial Tenancies (Retail Shops) Agreements Act 1985* (WA) (RSA) or Regulations	Corrs comments
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.	There is no corresponding provision in the RSA.	Leasing Principle 6 is consistent with the RSA as the tenant is only required to pay the relevant proportion of operating expenses (including rates and taxes) determined by reference to the net lettable area of the premises.
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.	There is no corresponding provision in the RSA.	There is no specific provision in the RSA which contravenes this Principle 7.
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.	There is no corresponding provision in the RSA. Under s 14 of the RSA, the landlord is liable to pay the tenant compensation where the landlord inhibits access to the retail shop in any substantial manner, takes any action that would substantially alter or inhibit the flow of customers or causes any disruption to trading within the centre which causes loss of profits to the tenant and the landlord has not rectified the matter within a reasonable time of the tenant giving the landlord notice in writing requiring the landlord to rectify the matter. Under s 12C of the RSA, a landlord cannot require a tenant to open or trade at specified hours or specified times.	If a landlord reduces services to the centre or undertakes measures that impact the flow of customers (e.g. due to cleaning or sanitising arrangements), it will need to have regard to the impact this may have on tenants and the landlord's potential liability under s 14 of the RSA. The landlord also cannot reduce services such that the landlord effectively determines a tenant's opening hours or when a tenant is able to trade as this may be a breach of s 12C of the RSA.
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.	There is no corresponding provision in the RSA.	There is no specific provision in the RSA which contravenes this Principle 9. It is unclear what the Australian Government will define as 'the COVID-19 pandemic ending', including whether this will be determined at a State or national level given some States and Territories may recover from the pandemic quicker than others. The WA Act has initially defined the emergency period as a 6 month period ending on 29 September 2020, but this may be shortened or extended by regulation (we note this has not occurred to date).

	Western Australia		
	Leasing Principles	Inconsistencies with or impacts on *Commercial Tenancies (Retail Shops) Agreements Act 1985* (WA) (RSA) or Regulations	Corrs comments
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.	Under s 14B of the RSA, the landlord is not able to claim for legal or other expenses relating to the negotiation, preparing or execution of lease, the renewal or extension of the lease, but may claim for expenses incurred in connection with the assignment or sub-lease of the lease. The RSA is silent on whether the landlord can claim in respect of a variation of the lease.	Although the RSA and Leasing Principles are silent on costs in respect of variations to the lease, we expect it is unlikely that the landlord will be able to recover these costs. It is unclear how Leasing Principle 10 applies to fees, interest and other charges that accrued prior to the COVID-19 pandemic and remain unpaid during the COVID-19 pandemic.
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.	There is no corresponding provision in the RSA.	There is no specific provision in the RSA which contravenes this Principle 11. It is unclear how Leasing Principle 11 applies to arrears that accrued prior to the COVID-19 pandemic and remain unpaid during the COVID-19 pandemic.
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.	Under s 13 of the RSA, every tenant is entitled to a minimum 5 year lease. Under s 13B of the RSA, where the lease does not contain an option to renew, the tenant may request and the landlord must give the tenant a statement stating whether the landlord will offer to renew the lease.	If a lease (including any option terms) is for less than 5 years then it is deemed to have an option to renew such that the tenant is entitled, in total, to a lease of the premises for 5 years. It is likely that the extension period required under Leasing Principle 12 would be in addition to the statutory right to a 5 year lease term. If a lease of 5 years or more does not contain an option to renew, section 13B gives tenants a right within the final 12 months of the term to request a statement of the landlord's intentions as to renewal. Section 13B contemplates that the landlord has discretion as to whether or not to offer a renewal of that lease, or alternatively end the lease on the expiry date. This is inconsistent with Leasing Principle 12, which requires the landlord to offer a renewal for a period equivalent to any period of rent waiver or deferral.
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.	There is no corresponding provision in the RSA.	There is no specific provision in the RSA which contravenes this Principle 13.
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.	There is no corresponding provision in the RSA.	While a tenant may elect to cease to trade it does not absolve them of their obligation to pay rent. This Leasing Principle is a prohibition on the landlord charging penalties if the tenant ceases to trade. As noted it item 8, the landlord cannot require the tenant to trade during certain hours.

Western Australia

Leasing Principles	Inconsistencies with or impacts on *Commercial Tenancies (Retail Shops) Agreements Act 1985* (WA) (RSA) or Regulations	Corrs comments
Other provisions to note – Unconscionable conduct	Under section 15C of the RSA, landlords and tenants must not engage in unconscionable conduct. The Tribunal will consider the following factors, among others, when determining whether a party has acted unconscionably: • the strengths of the bargaining positions of the parties; • any undue influence or pressure exerted on the other party; • whether the parties' conduct is consistent with their conduct in similar transactions with similar parties; • the requirements of any applicable industry code, including any code the other party reasonably believes applies; • the willingness of parties to negotiate the terms and conditions, including rent, of the lease; • whether the parties acted in good faith; and the extent to which either party unreasonably used information about the tenant's turnover rent to negotiate the rent.	Landlords and tenants should be mindful of the unconscionable conduct provisions in the RSA when negotiating arrangements under the Leasing Principles.
Other provisions to note – disclosure statements and tenant guide	Part II of the RSA requires landlords to give tenants disclosure statements and tenant guides prior to entering into an agreement for lease or lease. The tenant has termination rights if the landlord fails to provide the required documents or provides false or misleading information in the documents.	Landlords should take care when issuing disclosure statements and tenant guides. The Leasing Principles, the WA Act, WA Regulations and WA Code do not provide any relief for landlords with respect to disclosure and other obligations under the RSA during the emergency and recovery period. As an extension of lease, and in certain circumstances a variation of lease, constitutes a surrender and re-grant of the lease at law, landlords should be careful to consider whether they need to issue new a new disclosure statement and tenant guide when negotiating any variations.

Western Australia

Leasing Principles	Inconsistencies with or impacts on *Commercial Tenancies (Retail Shops) Agreements Act 1985* (WA) (RSA) or Regulations	Corrs comments
Other provisions to note – binding mediation Where landlords and tenants cannot reach agreement on leasing arrangements (including 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.	There is no requirement under the RSA that the parties undertake alternative dispute resolution. However, under s 25A of the RSA, parties may request the Small Business Commissioner to assist to resolve any matter that may be referred or submitted to the Tribunal or to undertake alternative dispute resolution in respect of that matter. The Small Business Commissioner is empowered to assist under s 30A of the RSA. Nothing in Part III of the RSA prevents a matter from being dealt with through a compulsory conference or mediation process under the *State Administration Tribunal Act 2004* (WA) (**SAT Act**).	As there is no specific alternative dispute resolution process in relation to commercial leasing in WA, the WA Act has introduced provisions to enable parties to avail themselves of the assistance of the Small Business Commissioner to resolve the dispute or to exercise the rights under the *Small Business Development Corporation Act 1983* to refer a dispute to ADR. Parties are also able to go directly to the Tribunal (by agreement) or by referral from the Commissioner. The Tribunal may exercise its rights under the SAT Act to require the parties to attend a compulsory conference or mediation however it is unclear whether the Tribunal will exercise this right if the parties have had recourse to the ADR options under the *Small Business Development Corporation Act 1983*. The requirement under the Leasing Principles to undertake alternative dispute resolution is not inconsistent with the intention of the Court process in WA.

Annexure 5: Key mediation provisions

Overview of jurisdictions

Jurisdiction	Legislation	Mediation?	Can the mediator/conciliator make a determinative order without the parties' consent?
NSW	*Retail Leases Act 1994* (NSW) Part 8	• Mediation must occur before any litigation may be commenced (s 68). • Mediation is conducted by the Registrar of Retail Tenancy Disputes whom is appointed by the Minister (ss 64-65).	No
NSW	*Conveyancing (General) Regulation 2018* (NSW)	• Unless the Small Business Commissioner has certified in writing that mediation offered to be conducted by the Small Business Commissioner has failed to resolve the dispute, a landlord must not take action to terminate the lease, take possession of the premises or enforce other rights of the landlord under the Lease	No
Queensland	*COVID-19 Emergency Response Act 2020* (Qld) *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (Qld)	• Any or all the parties may refer a dispute to the Small Business Commissioner for mediation (s 26). • If this fails to resolve the dispute, the parties may commence proceedings in the Queensland Civil and Administrative Tribunal (s 41).	No
Victoria	*Retail Leases Act 2003* (Vic) Part 10	• Any or all the parties may refer a dispute to the Small Business Commission for mediation (s 86). • If this fails to resolve the dispute the parties may commence proceedings in the Victorian Civil and Administrative Tribunal (s 87).	No
Western Australia	*Commercial Tenancies (COVID-19 Response) Act 2020* (WA) Part 5 *Small Business Development Corporation Act 1983* (WA) Part 3, division 2	• During the emergency period, a party may request that the Small Business Commissioner (Commissioner) undertake alternative dispute resolution procedures in an attempt to resolve the dispute (s 18). • If this fails the Commissioner will issue a certificate allowing the party to commence proceedings in the State Administrative Tribunal (s 19). • Alternatively, during the emergency period a party may apply directly to the State Administrative Tribunal to have the dispute determined by the Tribunal if: – the parties agree and neither party has made a request to the Commissioner; or – the Commissioner has issued a certificate as set out above, (s 16). • The Tribunal also has the power at the first directions hearing to order confidential mediation and compulsory conferences before a SAT member who is a trained mediator or conference convenor.	No
South Australia	*Retail and Commercial Leases Act 1995* (SA) Part 9	• A party may apply to the Small Business Commissioner for mediation. Alternatively, where proceedings are on foot, the Court may refer the parties to the Commissioner for mediation and stay proceedings in the meantime (ss 64-65). • The Commissioner is also empowered to intervene in proceedings before a court (s 67).	No

Tasmania	*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (TAS) Parts 4 and 5	• A property owner and a tenant must first attempt to resolve any dispute between them by direct negotiation (s 39). • If this fails, either party may request the Office of Consumer Affairs to investigate the dispute and attempt to negotiate a mutually acceptable solution (s 39). • If this also fails, then either party may refer the dispute to the Retail Tenancies Code of Practice Monitoring Committee for resolution (s 39). • If this fails, then either party may refer the dispute to a court of competent jurisdiction (s 39).	No
Northern Territory	*Business Tenancies (Fair Dealings) Act 2003* (NT) Part 11	The disputing party applies to the Commissioner for the determination of a claim. The Commissioner, or a delegate will generally conduct a preliminary conciliation conference and potentially a conciliation conference. The conciliation conference may involve informal mediation, conciliation or other forms of alternative dispute resolution (s 91). The purpose of a conciliation conference is to negotiate a settlement, which may then be recorded in an order (ss 93 and 94).	Yes, but only where the monetary value of the claim is under $10,000 per s 98
Australian Capital Territory	*Leases (Commercial and Retail) Act 2001* (ACT) Part 14	All disputes are resolved by application to the Magistrates Court. At a case management conference, if the Court considers it likely that the parties may resolve their dispute, it may refer them to mediation or other alternative dispute resolution mechanisms (s 148).	No

Annexure 6: JobKeeper eligibility thresholds and turnover tests

JobKeeper Scheme and National Code – comparative table

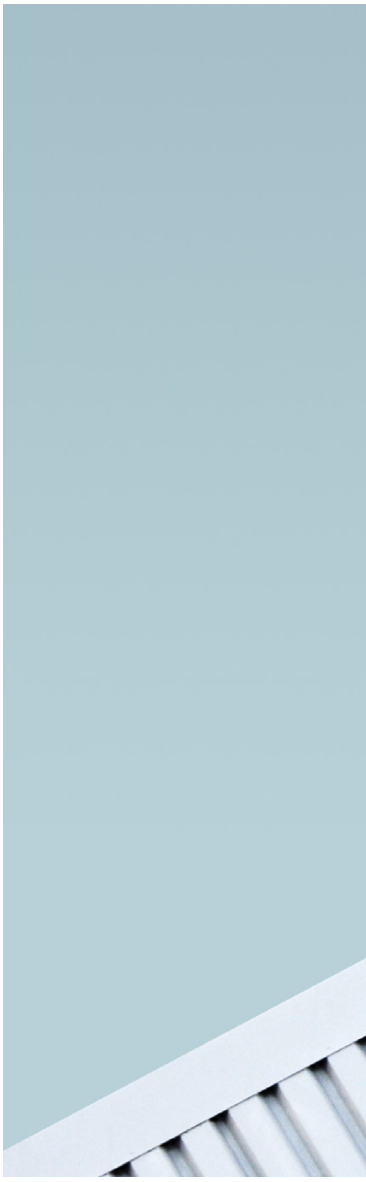
Item	JobKeeper Scheme	Code	NSW	Queensland	Victoria	Western Australia
Eligibility Threshold	The entity must have: c. carried on a business in Australia on 1 March 2020; and d. satisfied the decline in turnover test. **Decline in turnover test** a. If aggregated turnover is $1 billion or more, GST turnover must have declined by 50% or more. b. If aggregated turnover is less than $1 billion, GST turnover must have declined by 30% or more.	The entity must: a. be eligible for JobKeeper Scheme; and b. have an annual turnover of less than $50 million.	A tenant will be an "impacted lessee" under the Regulation if: a. The tenant qualifies for the Federal JobKeeper Scheme; and b. The tenant's turnover in the 2018 – 2019 financial year was less than $50 million: c. If the tenant is a franchisee – the turnover of the business conducted at the premises, d. If the tenant is a corporation that is a member of a group (within the meaning of the *Corporations Act 2001* (Cth) – the turnover of the group, e. In any other case – the turnover of the business conducted by the tenant.	A lease will be an 'affected lease' if: a. it is ii. a retail shop lease; or iii. a lease of a premises used wholly or predominantly for the carrying on of a business; d. as at 28 May 2020, the lease, or an agreement to enter into the lease, is binding on the tenant, whether or not the lease has commenced; and e. the tenant is an SME entity; and f. the tenant under the lease, or an entity that is connected with, or an affiliate of, the tenant responsible for, or involved in, employing staff for the business carried on at the leased premises, its eligible for the JobKeeper Scheme. "SME entity" is defined in the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cth) (**SME Rules**) and includes a requirement that the annual turnover for the current year is likely to be (or the annual turnover for the previous year was) less than $50 million.	For a lease to be an "eligible lease" the tenant must be: a. an SME entity; and b. an employer who participates in the JobKeeper Scheme. "SME entity" is defined in the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cth) (**SME Rules**) and includes a requirement that the annual turnover for the current year is likely to be (or the annual turnover for the previous year was) less than $50 million.	Under the WA Act a lease is a "small commercial lease" if it is: a. a retail shop lease as defined in the Commercial Tenancy (Retail Shops) Agreements Act 1985; or b. a lease where the tenant owns or operates a small business and uses the land or premises that are the subject of the lease for the purpose of carrying on that business; or c. a lease where the tenant is an incorporated association as defined in the Associations Incorporation Act 2015; or d. any other lease that is of a class prescribed by regulations for the purposes of this paragraph. Under the WA Code a "relevant small commercial lease" is a small commercial lease where the tenant is an "eligible tenant". An "eligible tenant" is a tenant: a. whose turnover in the financial year ending 30 June 2019 was less than $50 million: i. if the tenant is a franchisee, for the business conducted by the tenant at the land or the premises that are the subject of the small commercial lease;

JobKeeper Scheme and National Code – comparative table

Item	JobKeeper Scheme	Code	NSW	Queensland	Victoria	Western Australia
Eligibility Threshold *contined*						ii. if the tenant is a corporation that is a member of a group, for the group; iii. in any other case, for the business conducted by the tenant at the land or premises that are the subject of the small commercial lease; and b. the tenant: i. qualifies for the JobKeeper Scheme; or ii. has at any time during the emergency period satisfied the decline in GST turnover tests set out in section 8 of the JobKeeper Rules. Corporations constitute a group if they are related bodies corporate as defined in the *Corporations Act 2001*.
Relevant entity	Employing entity	Tenant entity. If franchisee, turnover of franchisee. If tenant is a member of a retail corporate group, turnover of the retail corporate group.	As per code except no reference to Retail 3 and in any other case, the turnover of the business conducted by the tenant.	Tenant entity. If the tenant is an entity connected with, or an affiliate of, another entity – the aggregate annual turnover of the entities and in any other case, the annual turnover of the business carried on by the tenant at the premises. 'affiliate', of an entity, means an affiliate of the entity under section 328-130 of the *Income Tax Assessment Act 1997* Cth). 'connected with' an entity means connected with the entity under section 328-125 of the *Income Tax Assessment Act 1997* (Cth).	As per Code except no reference to Retail and includes entities connected with the tenant, and entities that have a prescribed control or influence in decisions or actions of the tenant	Eligible tenant. If the tenant is a franchisee, the turnover for the business conducted by the tenant at the premises that is the subject of the small commercial lease. If the tenant is a corporation that is a member of a group, the turnover for the group; In any other case, for the business conducted by the tenant at the premises that is the subject of the small commercial lease;

JobKeeper Scheme and National Code – comparative table

Item	JobKeeper Scheme	Code	NSW	Queensland	Victoria	Western Australia
Turnover Test	**Aggregated Turnover** Turnover is assessed on an aggregated basis by applying the aggregation rules in the *Income Tax Assessment Act 1997* (Cth). This required an assessment of the turnover of the employer entity as well as any connected entity (on a worldwide basis). **GST Turnover** GST turnover is assessed: a. in accordance with the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as modified by the Rules; and b. on an entity basis (not a GST group basis).	$50m threshold The Code does not clarify how an entity's turnover is to be assessed for the purpose of the $50m threshold, particularly where the entity is part of a large corporate group. The Code does clarify however that the threshold will be applied at: a. the corporate group level for entities which are members of retail corporate group; and b. the franchisee level for entities which are part of a franchise.	$50m threshold and includes on line sales	$50m threshold and includes online sales but does not include a grant or assistance given by the Commonwealth, State or a local government to mitigate the effects of the COVID-19 emergency.	$50m threshold "annual turnover" is defined in the SME Rules as the total of the following that is earned in the year in the course of the business: a. the proceeds of sales of goods and/or services; b. commission income; c. repair and service income; d. rent, leasing and hiring income; e. government bounties and subsidies; f. interest, royalties and dividends; other operating income.	$50m threshold. The term "Turnover" is not defined in WA Act or WA Code. For the purpose of proportional rent reduction under the WA Code, unless otherwise agreed, the reduction in the tenant's turnover is to be calculated using the principles of the decline in turnover test set out in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) with such modifications as are relevant to reflect the principles in the WA Code.



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