

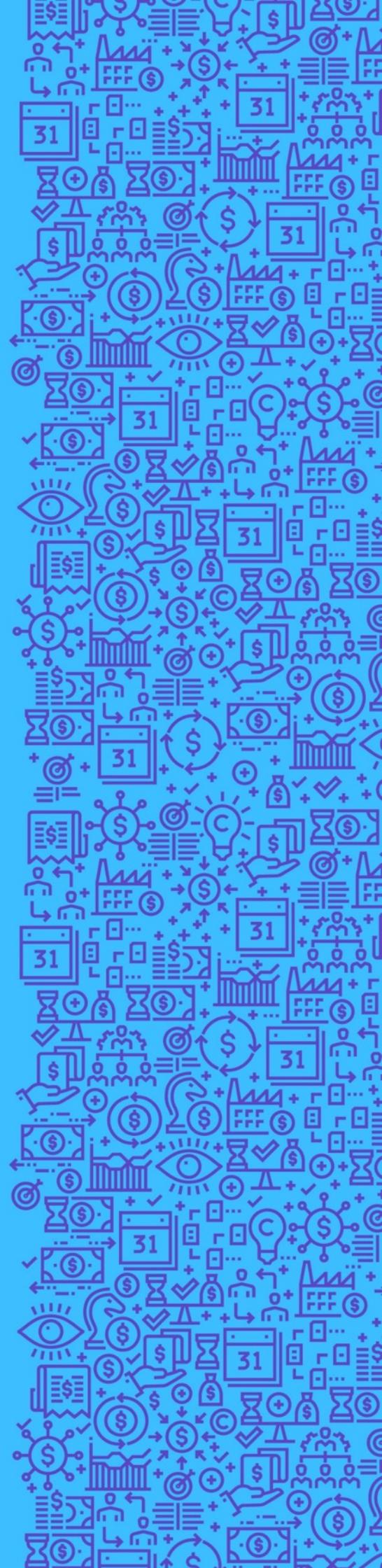


# Relief for Tenants and Landlords

**Latest Government Announcements**  
as of 12 May 2020

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# Legal analysis of tenancy relief



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Since the National Cabinet announced the Mandatory Code of Conduct (the Code) on 7 April 2020 for eligible commercial tenancies each State and Territory government has been working tirelessly to design a framework for implementation of the guidelines in the Code and funding of the required rental relief.

The various tax relief packages recently announced and outlined in this article are aimed at incentivising rent relief to be provided by commercial landlords and to give effect to the Code's requirement to pass on land tax reductions. We expect the announcements to expedite negotiations of rent waivers and deferrals now that landlords have some certainty as to what measures are available for funding rent relief in each State and Territory to give effect to the Code.

The relief packages do not deal with the myriad of other legal and practical issues arising from the Code and its implementation as these will be addressed by ensuing legislation and otherwise as a matter of negotiation between landlords and tenants adopting the overarching principle good faith approach required by the Code.

Landlords and tenants are currently grappling with a large number of these issues in order to mitigate the risk of unintended consequences of the Code and trying to balance risk reasonably in these exceptional circumstances including the following by way of example:

- Rent review freeze – is this intended to be forfeiture of the rent review or deferral? If the rent review is a market review this could have a significant impact on valuation of the rent beyond the pandemic and reasonable recovery period. If the rent review can be applied retrospectively (which is fairly common) then this will also impact the tenant's ability to recover and likely to be inconsistent with good faith requirements in the Code.
- Extension of term – the principle in the Code that tenants should be given the opportunity to extend its lease for an equivalent period of the rent waiver/deferral period will also be keenly negotiated as this could impact a landlord's ability to redevelop premises (particularly where there are redevelopment provisions) or restack tenancies and also the tenant's ability to relocate if it is unable to adequately recover. For leases with less than 24 months of the term remaining, the tenant's repayment covenant of deferred rent will need to be secured beyond the expiry, including bank guarantees, but the Code does not provide guidance in this regard.
- Passing on tax relief – the Code requires landlords to pass on any tax relief and any arrangements will need to carefully document this obligation and to ensure that any outgoings clearly exclude these taxes.

- Current incentives – if there are current rent and outgoings incentives in place then will landlords still be required to waive rent/defer rent?
- Outgoings waiver – the principle in the Code that landlords should where appropriate waive outgoings (including passing on any land tax, council rates or insurance relief for the period a tenant is unable to trade) will likely be keenly negotiated given outgoings typically represent 20-30% of the gross rent and landlords still have obligations under leases for repair, maintenance, services (albeit at reduced usage) and insurance during the pandemic and recovery.
- Disagreement as to rent relief – if the parties cannot agree on rent relief and the matter is referred for mediation, what are the interim rent relief arrangements?
- FIRB considerations – if the tenant is foreign for the purposes of the Foreign Acquisitions and Takeovers Act 1975 ("Act") an extension of the lease term may trigger the requirement to obtain FIRB approval in limited circumstances due to the recent reduction in thresholds under the Act to zero.

The leasing principles in the Code only apply to eligible commercial tenancies but are likely to be used as a benchmark by non-eligible tenants whose turnover has been materially impacted by the pandemic to negotiate rent waivers, deferrals and other measures to assist them through this period of uncertainty.

As these arrangements are negotiated, they should be documented so that there is a clear record and understanding of what has been agreed (whether by formal variation or exchange of correspondence). Any negotiations should also consider any consequences that could have long term implications for the viability of the lease from both the landlord and tenant perspective, irrespective of whether they are eligible commercial tenancies.

Since introduction of the Code, each State and Territory has also made various announcements in relation to residential tenancies and passed emergency legislation in some cases to ban evictions during the pandemic. We are monitoring developments closely in this regard as it is likely that principles in the Code will influence the framework for implementation and further legislative change in relation to residential tenancies including analogous tenancies in the aged care, student accommodation and disability services industries.

# Industry analysis of tenancy relief

The recently announced landlord and tenancy support packages by the State and Territory Governments present further support for both the real estate sector and tenants alike.

The focus of much of the relief is on “mum and dad” businesses and investors, and the mid-market. This reflects a policy approach which, commendably, seeks both to reasonably balance stakeholder interests, and to achieve a high level of integration with other business support measures.

Key to the policies is the concept of using land tax reductions and deferrals to provide cash flow support to commercial landlords who are being affected by tenants’ distress through the effects of COVID-19.

The initiatives announced provide a welcome cash flow safety net for landlords, whilst also providing critical economic support for tenants during these difficult times.

Thresholds for application of the land tax reductions in certain States are consistent with the Federal Government’s definitions of financial distress. These definitions extend to businesses that generate up to \$50m in revenues and have had a 30% reduction in revenues as a result of COVID-19 business interruptions. These thresholds are consistent with the eligibility criteria for previous policy announcements (e.g. JobKeeper and Cash Flow Boost measures).



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As such, while the measures will not be available across the whole of the property industry, they are intended to target those parts of the economy where the need for relief will be most acute.

Whilst the direction of these policies is supportive and positive, the ultimate impact on industry will be found in the extent of the rental reductions agreed to (including in instances where the measures are not available). How recipients match the financial support provided by the 25 per cent land tax reduction will also be crucial. Another factor that will weigh on the effectiveness of this support will be how long the affected tenants are in financial distress noting that some schemes are finite and only last 6 months. Only time will tell as to whether further support is required in the current environment.

We expect, on the back of the State and Territory Government announcements that have been made, that the final policy structures will permit effective frameworks for negotiations between landlords and tenants and provide greater clarity to all constituents to achieve agreed outcomes.

The announcement of these support packages dovetails well with the banks’ announcements of lending support and mortgage payment relief for landlords and continues the theme of all parts of the community “sharing the pain” of this extraordinary event.

# Relief for tenants and landlords – overview of announcements

This table overviews the measures announced by the States and Territories to support tenants as at 12 May 2020. All states may add to their announcements in due course.

	Limiting evictions (note 1)	Land tax or other breaks (note 2)	Residential rent assist funds (note 3)	Mediation / disputes scheme (note 4)	Rent waivers / deferrals (note 5)	Eligibility / Other info (note 6) * refer to announcement for further detail	Announcement
<b>NSW</b>	Yes	Yes	No	Yes	Yes	<ul style="list-style-type: none"> <li>• Turnover and revenue reduction thresholds apply.</li> <li>• Residential tenants must have 25% reduction in household income.</li> </ul>	Announced 13 April ( <a href="#">link</a> ) Residential policy ( <a href="#">link</a> )
<b>VIC</b>	Yes	Yes	Yes+	Yes	Yes	<ul style="list-style-type: none"> <li>• Also prohibiting rent increases.</li> <li>• Turnover and revenue reduction thresholds apply.</li> <li>• +Rent relief for liquor licencees available</li> </ul>	Announced 15 April ( <a href="#">link</a> ) and liquor licencees 3 May ( <a href="#">link</a> ) and mediation service ( <a href="#">link</a> )
<b>WA</b>	Yes	Yes	Yes	Yes	Yes	<ul style="list-style-type: none"> <li>• Commercial tenants are eligible if turnover has reduced by 30%</li> <li>• Residential tenants are eligible for a \$2,000 grant if in financial distressed.</li> </ul>	Announced 14 April ( <a href="#">link</a> , <a href="#">FAQs</a> ) Further support announced 23 April ( <a href="#">link</a> , <a href="#">more info</a> )
<b>QLD</b>	Yes	Yes	Yes	Yes	Yes		Announced 9 April ( <a href="#">residential</a> , <a href="#">commercial</a> )
<b>SA</b>	Yes	Yes	No	Yes	Yes	<ul style="list-style-type: none"> <li>• Commercial tenants are eligible if turnover reduced by 30%.</li> <li>• Residential tenants eligible for rent relief if in financial hardship.</li> </ul>	Announced 7 April ( <a href="#">link</a> ) and 24 April ( <a href="#">link</a> )
<b>TAS</b>	Yes	See note	Yes	Yes	Yes	<ul style="list-style-type: none"> <li>• Parliament recalled to "give effect to National Code" but few specific announcements.</li> </ul>	3 announcements to 8 April ( <a href="#">link</a> , <a href="#">link</a> , <a href="#">link</a> ) and more recently on 6 May ( <a href="#">link</a> )
<b>ACT</b>	Yes	Yes	No	Yes	Yes		Announced 2 April ( <a href="#">link</a> )
<b>NT</b>	Yes	Yes	No	Yes	Yes	<ul style="list-style-type: none"> <li>• Payroll tax concessions and bill support.</li> </ul>	Announced 8 April ( <a href="#">link</a> )

# Relief for tenants and landlords – overview of announcements (continued)

*This table overviews the measures announced by the States and Territories to support tenants as at 12 May 2020. All states may add to their announcements in due course.*

## Brief Notes

<b>Note 1:</b> <b>Limiting evictions</b>	National Cabinet agreed on a ban on evictions for SME commercial tenants that have been impacted by COVID-19 – this has been endorsed by all States and Territories (link to Code). In certain cases States have announced extended eligibility to the residential sector.
<b>Note 2:</b> <b>Land tax or other breaks</b>	<b>NSW</b> <ul style="list-style-type: none"><li>• \$440 million land tax break to benefit tenants and landlords (commercial and residential sectors).</li><li>• Commercial landlords must pass the savings on to tenants through a rent reduction to benefit.</li><li>• Eligible landlords can apply for a land tax concession of up to 25 per cent of their 2020 (calendar year) land tax liability on relevant properties.</li><li>• A further land tax deferral for any outstanding amounts for a three-month period will also be offered to landlords who claim the land tax concession.</li></ul> <b>VIC</b> <ul style="list-style-type: none"><li>• \$420 million land tax relief program announced (commercial and residential sectors).</li><li>• 25 per cent discount on their land tax, with remaining tax potentially deferred until March 2021 for landlord providing tenants impacted by coronavirus with rent relief.</li></ul> <b>QLD</b> <ul style="list-style-type: none"><li>• Three month rebate of land tax for 2019-20, followed by a three month deferral of land tax 2020-21 for property owners who agree to provide rent relief for tenants affected by the coronavirus downturn (commercial sector).</li><li>• A landowner can apply for land tax relief if they meet certain criteria.</li></ul> <b>NT</b> <ul style="list-style-type: none"><li>• When commercial tenants demonstrate hardship and request rent relief, landlords will be expected to negotiate relief in line with the Code of Conduct for commercial tenancies, agreed to by National Cabinet. If they do this they will be eligible to receive payroll tax and utilities bills relief, and rates relief provided by local councils may also apply.</li></ul> <b>ACT</b> <ul style="list-style-type: none"><li>• Land tax waivers will apply in the ACT in certain case where rent relief has been agreed with tenants.</li></ul> <b>SA</b> <ul style="list-style-type: none"><li>• \$50 million in emergency land tax relief for landlords has been announced bringing the total assistance to \$120m for local investors over the next year. Under the emergency scheme eligible landlords* will be offered a 25% reduction on their 2019-20 land tax liability on affected properties.</li><li>• SA Government has also announced land tax deferrals for 6 months.</li></ul> <b>TAS</b> <ul style="list-style-type: none"><li>• Tasmanian Government has announced land tax waivers for commercial properties for the 2020-21 financial year as long as the business owner is liable for the land tax; and can demonstrate that their business operations have been affected by COVID-19. It is unclear if this extends to landlords at this stage.</li></ul> <b>WA</b> <ul style="list-style-type: none"><li>• To be eligible for \$100 million in land tax relief, commercial landlords must provide rent relief that equates to a minimum of three months' rent and freeze outgoings to small businesses that have suffered at least a 30 per cent reduction in turnover due to COVID-19.</li><li>• Grants equivalent to 25 per cent of the landlord's land tax bill for 2019 20 for the property in which an eligible tenant is provided relief will be paid to landlords.</li></ul>

# Relief for tenants and landlords – overview of announcements (continued)

This table overviews the measures announced by the States and Territories to support tenants as at 12 May 2020. All states may add to their announcements in due course.

## Brief Notes

### Note 3:

#### Residential rent assist funds

#### VIC

- \$80 million rental assistance fund for renters facing hardship due to coronavirus.
- Eligibility: renters will need to have registered their revised agreement with Consumer Affairs Victoria or gone through mediation, have less than \$5,000 in savings and still be paying at least 30 per cent of their income in rent.
- A further \$40 million is available for rent assistance for commercial tenants with liquor licences.

#### QLD

- The residential package includes a \$2,000 grant for urgent rental payments.

#### WA

- The Government has committed \$30 million for grants of up to \$2,000 for residential tenants who have lost their job and are facing financial hardship. The scheme will be available to tenants or sub-tenants who have lost their job, applied to Centrelink for income support, have less than \$10,000 in savings, and are still paying at least 25 per cent of their income in rent.

#### TAS

- The Tasmanian Government announced that it would provide further financial assistance to residential tenants through a support fund for tenants. The fund will only be available in cases of extreme hardship where other forms of assistance, such as the Commonwealth's JobSeeker and JobKeeper programs are not providing the assistance required to support rent payments.
- The Government will consult with the Tenants Union of Tasmania and the Residential Tenancy Commissioner to achieve an outcome on the eligibility arrangements for the fund that is reasonable and fair with further details to be announced.

### Note 4:

#### Mediation / disputes scheme

These schemes fall within the National Cabinet Code ([link to Code](#)), which applies to SME commercial tenants. Some additional information on particular State / Territory announcements are below.

#### NSW

- Announcement details that increased mediation and advisory services will be provided to commercial parties to facilitate other measures.

#### VIC

- Announcement states Government will implement: "a fast-tracked dispute resolution service, with Consumer Affairs Victoria or the Victorian Small Business Commission mediating to ensure fair agreements are reached".
- The mediation scheme is available for SMEs, however has been expanded to larger businesses that hold liquor licenses.

#### WA

- Will create "fast and free disputes resolution process" to help facilitate mediation between landlords and tenants.
- Consumer Protection provides information, advice and a free conciliation service to assist tenants and landlords to reach agreement. Call 1300 304 054 or email [consumer@dmirs.wa.gov.au](mailto:consumer@dmirs.wa.gov.au).

#### TAS

- Any appeals from tenants for a notice to vacate due to rental arrears that are currently waiting to be heard by the Magistrates Court will be put on hold.

# Relief for tenants and landlords – overview of announcements (continued)

This table overviews the measures announced by the States and Territories to support tenants as at 12 May 2020. All states may add to their announcements in due course.

## Brief Notes

### Note 5: Rent waivers / deferrals

Rent waivers fall within the National Cabinet Code ([link to Code](#)), which applies to SME commercial tenants. Some additional information on particular State / Territory announcements are below. Review the Code and announcements for full details.

#### VIC

- Government will “urgently legislate so that eligible small and medium sized businesses can be granted rental waivers or deferrals”.

#### QLD

- Government has announced it will allow leases to be extended for the term of a rent waiver that has been agreed to by property owner and tenant (commercial sector).
- A landowner can apply for land tax relief if they meet criteria including:
  - the landowner rents all or part of a property to a tenant/s OR all or part of a property is currently available for lease; AND
  - at least one tenant’s ability to pay their normal rent OR the landowner’s ability to secure a tenant is affected by the COVID-19 pandemic; AND
  - the landowner provides rent relief to an affected tenant/s commensurate with the amount of the land tax rebate OR
  - if the property is unable to be leased, the landowner requires land tax relief to meet their financial obligations (such as debt repayments); AND
  - the landowner complies with new leasing requirements, even if the relevant lease is not regulated
- A [separates set of guidelines](#) also outlines eligibility. The Residential Tenancies Practice Guide provides detail on:
  - Threshold criteria to qualify for the application of the COVID-19 rental response that includes a 25 per cent reduction in income, or where rent exceeds 30 per cent of the tenant's income.
  - The evidence that tenants can be asked to provide the same proof of finances to property managers just as they would when starting a tenancy.
  - The 75 per cent income loss and less than \$5,000 in savings threshold before a tenant is eligible for a 7-day cap on break lease fees if they end a fixed term lease early.

#### WA

- To be eligible for \$100 million in land tax relief, commercial landlords must provide rent relief that equates to a minimum of three months' rent and freeze outgoings to small businesses that have suffered at least a 30 per cent reduction in turnover due to COVID-19.
- Grants equivalent to 25 per cent of the landlord's land tax bill for 2019-20 for the property in which an eligible tenant is provided relief will be paid to landlords. For more information on eligibility criteria and how to apply, visit <http://www.smallbusiness.wa.gov.au>

#### ACT

- With a number of renters expected to receive financial support through the Commonwealth Wage Subsidy scheme, the ACT Government will encourage landlords to reduce rents by at least 25 per cent for tenants under rental stress by sharing the cost reduction of the rental on a 50/50 basis, capped at \$1,300 per quarter (around \$100 a week). This could result in rental relief of up to \$200 a week for tenants who have lost income due to COVID-19.

#### SA

- Landlords who provide tenants impacted by COVID-19 with rent relief may be eligible for a 25% reduction on the land tax payable on a parcel of land in the 2019-20 land tax year. The relief is available when:
  - the land is used for residential or non-residential (commercial) purposes;
  - the land is being leased to either (i) a residential tenant, or (ii) a non-residential (commercial) tenant with annual turnover of up to \$50 million, who has been financially impacted as a result of the COVID-19 pandemic;
  - the landlord reduces the rent of the affected tenant by at least as much as the land tax reduction; and
  - the land tax is directly related to the land for which the rent has been reduced.

### Note 6: Eligibility / Other info

The National Cabinet Code applies to SME tenants with turnover up to \$50 million p.a. who would be eligible for the JobKeeper program i.e. 30 percent reduction in turnover ([link to Code](#)). Where the States / Territories have announced measures (e.g. residential measures) that go beyond the Code, separate criteria may apply.

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