

Implementation of the Mandatory Code of Conduct on Commercial Leases – State Comparison

Summary of key differences in implementation of the Code of Conduct across New South Wales, Victoria, Queensland, South Australia and Western Australia

- To implement the Code of Conduct, Victoria, Queensland, South Australia and Western Australia introduced new legislation with regulation-making powers, whereas New South Wales used existing regulation-making powers.
- In Victoria, the tenant must qualify for *and* be a participant in the JobKeeper program to be eligible. In New South Wales, Queensland, South Australia and Western Australia tenants need only be eligible for JobKeeper not necessarily participants.
- The Victorian, Queensland, South Australian and Western Australian regulations both apply retrospectively from the end of March, whereas the New South Wales regulation only applies prospectively from the date it was published on the New South Wales Legislation website (24 April).
- The Victoria regulation includes penalties for non-compliance (e.g. for when a landlord attempts to evict a tenant). New South Wales, Queensland, South Australia and Western Australia do not include penalties.
- The Victoria, Queensland and Western Australia regulation explicitly sets out *revised* leasing principles 3 and 4 relating to rent relief. New South Wales and South Australia incorporate these principles by reference to the Code alone.
- In Victoria, Queensland, South Australia and New South Wales, matters concerning affected leases must go before the relevant Small Business Commissioner for mediation before being brought before a court or tribunal. In Western Australia, parties can both agree to take a matter straight to a tribunal.
- The Victorian, Queensland, South Australian and Western Australian regulations detail what a court or tribunal can consider in making an order in relation to affected leases. The NSW regulation states that courts and tribunals are simply to have regard to the leasing principles in the Code.
- Queensland explicitly prescribes for Principle 2, that a lessor can take action against a lessee if the lessee fails to comply to a material term under the lease.
- Queensland also explicitly excludes government assistance and grants from the calculation of turnover.

	New South Wales https://www.smallbusiness.nsw.gov.au/	Victoria https://www.vsbic.vic.gov.au/	Queensland https://www.business.qld.gov.au/running-business/support-assistance/qsbic	South Australia https://www.sasbc.sa.gov.au/	Western Australia https://www.smallbusiness.wa.gov.au/about/about-sbdc/small-business-commissioner
Model	NSW used existing Regulation making powers under the Retail Leases Act 1994 and the Conveyancing Act 1919 . Regulation <ul style="list-style-type: none"> Retail and Other Commercial Leases (COVID-19) Regulation 2020 	VIC passed new legislation to enable the Regulations. Regulation: <ul style="list-style-type: none"> COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 	QLD passed new legislation to enable the Regulations. Regulation: <ul style="list-style-type: none"> Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 	SA passed new legislation to enable the Regulations. Regulation: <ul style="list-style-type: none"> COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020 	WA passed new legislation to enable the Regulations. Regulation: <ul style="list-style-type: none"> Commercial Tenancies (COVID-19 Response) Regulations 2020
Objectives	<ul style="list-style-type: none"> To prohibit and regulate the exercise of certain rights of landlords relating to the enforcement of commercial leases. To require that landlords and tenants renegotiate the rent and other terms of their lease in good faith having regard to the leasing principles in the national Code of Conduct. 	<ul style="list-style-type: none"> To implement temporary measures to apply to tenants and landlords under some eligible leases to mitigate the effect of measures taken in response to COVID-19. To implement mechanisms to resolve disputes concerning eligible leases. 	<ul style="list-style-type: none"> To mitigate the effects of the COVID-19 emergency on lessors and lessees under affected leases by giving effect to the good faith leasing principles set out in the Code To establish a process for resolving tenancy disputes 	<ul style="list-style-type: none"> To implement temporary measures to apply to tenants and landlords under some eligible leases to mitigate the effect of measures taken in response to COVID-19. To implement mechanisms to resolve disputes concerning eligible leases. 	<ul style="list-style-type: none"> To introduce a range of measures to provide for urgent relief for eligible tenants of small commercial leases in response to the COVID-19 pandemic.
Date of effect	<ul style="list-style-type: none"> 24 April – 24 October. 	<ul style="list-style-type: none"> 29 March - 29 September. 	<ul style="list-style-type: none"> 30 March – 30 September 	<ul style="list-style-type: none"> 30 March – 30 September 	<ul style="list-style-type: none"> 30 March – 29 September
Eligibility	Regulation applies to commercial (retail, office and industrial) tenants that:	An eligible lease is a retail lease or a non-retail commercial lease or licence:	Regulation applies to “affected leases” where the lease is a retail shop or other prescribed lease, and: <ul style="list-style-type: none"> The lessee is <i>eligible</i> for JobKeeper 	Regulation applies to commercial leases that: <ul style="list-style-type: none"> Have a turnover less than \$50 million in 2018-19, and 	Regulation applies to eligible tenants of small commercial leases (including retail shops, small businesses and incorporated associations) that:

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	<ul style="list-style-type: none"> Had an annual turnover less than \$50 million in 2018-19. Have experienced at least a 30 per cent decline in turnover (or 15% in the case of not for profits), compared with a corresponding month or quarter in 2019. The eligible entity and decline in turnover tests are the same as the tests for JobKeeper. 	<ul style="list-style-type: none"> that is in effect on the day the first regulations made under section 15 come into operation; and under which the tenant is, on or after the commencement of the first regulations: <ol style="list-style-type: none"> an SME entity; and an employer who qualifies for the jobkeeper scheme and is a participant in the jobkeeper scheme. 	<ul style="list-style-type: none"> The lessee is an SME entity with an annual turnover of less than \$50 million If the lessee is a franchisee, a lease under which the franchisor is lessee of the premises occupied by the franchisee is also an affected lease 	<ul style="list-style-type: none"> Are suffering from financial hardship as a result of COVID-19, determined by their eligibility for, or participation in, the JobKeeper program 	<ul style="list-style-type: none"> Have an annual turnover in 2018-19 that was less than \$50 million Qualifies for JobKeeper or has otherwise satisfied the decline in turnover test set out in the JobKeeper rules
Eligibility–excluded lease	<ul style="list-style-type: none"> Excludes leases entered into after the commencement of the Regulation. Excludes leases under the <i>Agricultural Tenancies Act</i>. 	<ul style="list-style-type: none"> Excludes farming and agricultural leases. 	<ul style="list-style-type: none"> Excludes farming and agricultural leases. 	<ul style="list-style-type: none"> Excludes Pastoral leases and leases under the Crown Land Management Act. 	<ul style="list-style-type: none"> Long-stay agreements, residential tenancies, pastoral leases, mining tenements
Turnover definition	<ul style="list-style-type: none"> Turnover includes any turnover derived from online sales 	Turnover includes: <ol style="list-style-type: none"> the proceeds of sales of goods and/or services; commission income; repair and service income; rent, leasing and hiring income; government bounties and subsidies; interest, royalties and dividends; other operating income. 	<ul style="list-style-type: none"> Turnover includes income earned from internet sales, but does not include a grant or assistance given by the Commonwealth, State or local government to mitigate the effects of COVID-19 emergency 	<ul style="list-style-type: none"> Turnover includes any turnover derived from online sales 	<ul style="list-style-type: none"> Applies the turnover test from the JobKeeper rules (including any relevant alternative decline in turnover test)
“Prescribed Actions”	<ol style="list-style-type: none"> eviction of the lessee 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, distrain of goods, forfeiture, damages, requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a lessee, recovery of the whole or part of a security bond under the commercial lease, performance of obligations by the lessee 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 lessor against a lessee at common law or under the law of this State 	Not explicitly provided for	<ol style="list-style-type: none"> recovery of possession; termination of the lease; eviction of the lessee; exercising a right of re-entry to premises; seizure of any property, including for the purpose of securing payment of rent; forfeiture; damages; the payment of interest on, or a fee or charge relating to unpaid rent or outgoings; a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings; the performance of an obligation by the lessee or another person under a guarantee under the lease; exercising or enforcing another right by the lessor under the lease or other agreement relating to the leased premises 	<ol style="list-style-type: none"> eviction of the lessee 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, distrain of goods, forfeiture, damages, requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a lessee, recovery of the whole or part of a security bond under the commercial lease, performance of obligations by the lessee 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 lessor against a lessee at common law or under the law of this State 	The Act includes the following “Prohibited actions”: <ol style="list-style-type: none"> eviction of the tenant from premises or land the subject of the small commercial lease, exercising a right of re-entry to premises or land the subject of the small commercial lease, possession recovery of land, distrain of goods, forfeiture, termination of the small commercial lease damages, requiring a payment of interest on unpaid rent or on any other unpaid amount of money payable by a tenant (including, without limitation, operating expenses), recovery of the whole or part of any security for the performance of the tenant’s obligations under the commercial lease, performance of obligations by the tenant or any other person under a guarantee under the small commercial lease,

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					l) any other remedy otherwise available to the landlord against the tenant at common law or under a written law
Non-payment of rent (Principles 1 & 11)	<ul style="list-style-type: none"> A landlord must not take any “prescribed action” against a tenant on the grounds of a failure to pay rent or outgoings. 	<ul style="list-style-type: none"> Non-payment of rent, an outgoing, or any other payment required to be paid by the tenant is deemed not to breach an eligible lease and does not give the landlord the right to evict a tenant or have recourse to any security. A tenant must make an application for rent relief to get the benefits of prohibition on eviction 	<ul style="list-style-type: none"> Landlord cannot take any prescribed action against lessee for failure to pay rent, outgoings or staying open for the hours specified in the lease. However, a landlord can take prescribed action on grounds not related to COVID-19 or if the tenant does not comply with a renegotiated agreement 	<ul style="list-style-type: none"> Landlord cannot take any prescribed action against lessee for failure to pay rent, outgoings or staying open for the hours specified in the lease. 	<ul style="list-style-type: none"> Under the Act, a landlord cannot take any prohibited action against the tenant for failure to pay rent or outgoings or not being open for the hours specified in the lease.
Penalties	<ul style="list-style-type: none"> No penalties are provided for under the Regulation. 	<ul style="list-style-type: none"> If a landlord purports to evict a tenant under an eligible lease the landlord is guilty of an offence. If a landlord purports to make a claim for rent that has been waived the landlord is guilty of an offence. 	<ul style="list-style-type: none"> Only prescribes penalties for breaching confidentiality provisions 	<ul style="list-style-type: none"> No penalties are provided for under the Regulation. 	<ul style="list-style-type: none"> No penalties are provided for under the Regulations.
Rent relief requests (Leasing Principles 3 & 4)	<ul style="list-style-type: none"> Leasing Principles 3 & 4 are not set out in the Regulation, they are included by reference to the Code. The landlord must renegotiate rent and other terms of the lease in good faith having regard to the leasing principles in the Code of Conduct. Timeframes for the provision of rent relief not stipulated. Documentation requirements not stipulated (covered in guidance material on Service NSW website) No provision for subsequent rent relief negotiations. 	<ul style="list-style-type: none"> Principles 3 & 4 are explicitly set out and have been revised (i.e. landlords are not required to offer rent relief proportionate to a decline in an eligible tenants’ turnover, however, the landlords’ offer must take into account the reduction in the tenants’ revenue). Positive obligation on the landlord to offer rent relief when requested (in writing) by eligible tenant. No less than 50% of the rent relief offered must be in the form of a rent waiver (unless agreed otherwise by both parties in writing). Landlord must offer rent relief within 14 days following a tenant's written request (unless agreed otherwise by both parties in writing). Tenants can make subsequent requests for rent relief if their situation materially changes. 	<ul style="list-style-type: none"> Principles 3 & 4 are explicitly set out. Parties to an affected lease can request a negotiation and must provide <i>sufficient information</i> to the other party that enables negotiations Sufficient information includes accurate financial information, information about eligibility as ‘affected lease’, information about steps taken to mitigate impact of COVID-19 A lessor must offer rent relief within 30 days that consists of at least a waiver for at least 50% of reduction. Parties can make subsequent requests for rent relief if their situation materially changes. 	<ul style="list-style-type: none"> Principles 3 & 4 are not set out in the negotiation part of the Regulation, they are included by reference to the Code. However, they are set out under the types of orders a court can make. No obligation on landlords to offer rent relief; only an obligation to negotiate in good faith. Timeframes for the provision of rent relief not stipulated. Documentation requirements not stipulated (covered in online guidance material). No provision for subsequent rent relief negotiations. 	<ul style="list-style-type: none"> Principles 3 & 4 are explicitly set out in the Regulations. Tenant must provide sufficient and accurate information to the landlord that evidences their eligibility and turnover decline. Landlord must offer rent relief within 14 days after receiving the request (unless both parties agree otherwise).
Confidentiality provisions	<ul style="list-style-type: none"> No confidentiality provisions included (this is covered in guidance material on the Service NSW website). 	<ul style="list-style-type: none"> Confidentiality provisions included to protect personal information provided (e.g. a landlord cannot pass on the bank statements of a tenant to a third party). However, a landlord may give information verifying the lease is an eligible lease to the Commissioner of State Revenue for the purpose of applying for tax relief. 	<ul style="list-style-type: none"> Confidentiality provisions included to protect personal information provided (e.g. a landlord cannot pass on the bank statements of a tenant to a third party). Penalties apply if a party discloses confidential information. 	<ul style="list-style-type: none"> Confidentiality provisions apply to the information gained in the mediation process. 	<ul style="list-style-type: none"> Confidentiality provisions apply to the protected information gained in the operation of the Regulations. Protected information is the contact details of any person other than the landlord or tenant as well as information relating to business processes or financial information. Disclosure of protected information is permitted only in a number of circumstances, including if provided to a professional adviser or financier

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					and in certain instances to the Small Business Commissioner.
Prohibition on rent increases (Principle 13)	<ul style="list-style-type: none"> Rent increases not permitted for eligible leases unless otherwise agreed (except for retail leases that are determined by reference to the volume of trade). 	<ul style="list-style-type: none"> Rent increases not permitted for eligible leases unless otherwise agreed (except for retail leases that are determined by reference to the volume of trade). 	<ul style="list-style-type: none"> Rent increases not permitted for affected leases unless otherwise agreed (except for retail leases that are determined by reference to the volume of trade). 	<ul style="list-style-type: none"> Rent increases not permitted for eligible leases unless otherwise agreed (except for retail leases that are determined by reference to the volume of trade). 	<ul style="list-style-type: none"> Under the Act, rent payable under a small commercial lease (other than rent or a component of rent determined by reference to turnover) cannot be increased during the emergency period.
Extension to the term of lease (Principle 12)	<ul style="list-style-type: none"> Not explicitly set out in the Regulation; incorporated by reference alone. No obligation for landlord to offer a lease extension; only obligation to negotiate in good faith. 	<ul style="list-style-type: none"> If rent is deferred under the agreement, a landlord must offer the tenant an extension to the term of lease (on the same terms as the lease was prior to any changes). The extension must be equivalent to period of rent deferral unless otherwise agreed. 	<ul style="list-style-type: none"> Where rent is deferred, the lessor must offer the lessee an extension to the term of the lease (equivalent to the period for which rent is waived or deferred) 	<ul style="list-style-type: none"> Not explicitly set out. 	<ul style="list-style-type: none"> Landlord must offer the tenant an extension of the lease term on the same terms and conditions that applied immediately before the emergency period (unless otherwise agreed). The extension offered must be equivalent to the period for which rent is deferred (unless otherwise agreed).
Landlord waiving outgoings and other expenses (Principle 8)	<ul style="list-style-type: none"> Not explicitly set out in the Regulation; incorporated by reference alone. No obligation for landlord to consider waiving outgoings or expenses payable; only obligation to negotiate in good faith. Landlord is prohibited from taking “prescribed actions” against tenants due to failure to pay outgoings. 	<ul style="list-style-type: none"> Landlord must consider waiving outgoings or expenses payable under an eligible lease when a tenant is not able to operate their business at the premise. Landlords can cease to provide relevant services as is reasonable in the circumstances. 	<ul style="list-style-type: none"> Lessor may reduce services for leased premises for any part of the response period because of the COVID-19 emergency A lessor is unable to take a “prescribed action” against an affected lessee who fails to pay outgoings. 	<ul style="list-style-type: none"> Not explicitly set out. Landlord cannot take “prescribed action” against lessee for failure to pay outgoings. 	<ul style="list-style-type: none"> Landlord must consider waiving outgoings or other expenses payable for the part of the emergency period that the tenant is unable to conduct their business. Under the Act, a landlord cannot take any prohibited action against the tenant for failure to pay outgoings.
Reduction of statutory charges and sharing benefits (Principles 6 and 7)	<ul style="list-style-type: none"> If a tenant is required to pay a fixed amount that represents an amount of land tax or any other statutory charge or insurance payable and this outgoing is reduced, the tenant is exempted from paying the reduced amount. 	<ul style="list-style-type: none"> If any third party reduces any outgoing charged in relation to the premises, a landlord must not require a tenant to pay any amount of that outgoing that is greater than a tenant's proportional share of the reduced outgoing payable. If the tenant has already paid more than their proportional share, a landlord must reimburse them. 	<ul style="list-style-type: none"> Not explicitly set out 	<ul style="list-style-type: none"> Not explicitly set out 	<ul style="list-style-type: none"> If outgoings relating to the emergency period or any part of the emergency period are reduced, the landlord must: <ul style="list-style-type: none"> not require the tenant to pay any amount of money related to the outgoing that is greater than the tenant's proportional share of the reduced outgoing payable under the lease; or if the tenant has already paid an amount of money greater than the tenant's proportional share of the reduced outgoings, reimburse the excess amount as soon as possible.
Deferred Rent (Principles 9 & 5)	<ul style="list-style-type: none"> Not explicitly set out in the Regulation; incorporated by reference alone. 	<ul style="list-style-type: none"> Repayment of deferred rent must be amortised over the greater of the balance of the term of the lease, including any extension to that term, or a period of no less than 24 months. No fees, interest or charges are payable for deferred rent. 	<ul style="list-style-type: none"> Repayment of deferred rent to be amortised, using a method agreed between the parties over a period of at least 2 years but no more than 3 years No fees, interest or charges are payable for deferred rent unless the lessee fails to comply with the conditions on which the rent is deferred 	<ul style="list-style-type: none"> Not explicitly set out under the negotiation process in the Regulation. However, a court can make an order on the timeframe for the payment of deferred rent. 	<ul style="list-style-type: none"> Repayment of deferred rent must be amortised over the greater of the balance of the term of the lease, or a period of not less than 24 months.

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Change in trading hours (Principle 14)	<ul style="list-style-type: none"> Landlord cannot take any “prescribed action” against lessee for failing to stay open for the hours specified in the lease. 	<ul style="list-style-type: none"> Any change in trading hours is not considered a breach of an eligible lease and does not give landlord right to evict or take recourse. 	<ul style="list-style-type: none"> Landlord cannot take any “prescribed action” against lessee for failing to stay open for the hours specified in the lease. 	<ul style="list-style-type: none"> Landlord cannot take any “prescribed action” against lessee for failing to stay open for the hours specified in the lease. 	<ul style="list-style-type: none"> Under the Act , a landlord cannot take any “prohibited action” against the tenant for failing to stay open for the hours specified in the lease.
Dispute Resolution	<ul style="list-style-type: none"> Mediation through the NSW Small Business Commission is mandatory for tenants and landlords that cannot reach an agreement, and must occur before any action can be pursued through NCAT or the courts. 	<ul style="list-style-type: none"> Tenant or landlord must refer a dispute to the Victorian Small Business Commission before commencing proceedings in the Victorian Civil and Administrative Tribunal. This is unless, the landlord or tenant has sought leave to commence a proceeding in the Supreme Court. 	<ul style="list-style-type: none"> Detailed overview of the mediation process included in the Regulation including whether the parties can have representation and evidentiary rules 	<ul style="list-style-type: none"> Parties must apply to the Small Business Commissioner for mediation prior to bringing the matter before a court or tribunal. 	<ul style="list-style-type: none"> The parties can apply to resolve a dispute with the Small Business Commissioner (SBC). Parties must try to resolve their dispute through the SBC before being able to apply to the State Administrative Tribunal.
Court processes	<ul style="list-style-type: none"> Courts and tribunal must have regard to the leasing principles in the National Code of Conduct. 	<ul style="list-style-type: none"> Clearly defines when the dispute can proceed to court proceedings. Sets out what the court and tribunal must have regard to in deciding, including whether the parties have attempted to come to a resolution through mediation. 	<ul style="list-style-type: none"> Clearly sets out when parties can be referred to the Court after mediation. Sets out what the court or tribunal can consider in making an order, including whether the parties have attempted to negotiate in good faith. Sets out the types of orders a court can make including an order about the payment of rent 	<ul style="list-style-type: none"> Clearly sets out when parties can be referred to the Court after mediation. Sets out what a Court can consider in making an order Sets out the types of orders a court can make including to order deferment of rent 	<ul style="list-style-type: none"> If both parties agree, a dispute can be taken straight to the State Administrative Tribunal. Sets out the types of orders a tribunal can make and what they should have regard to in making an order.