

RETAIL LEASING: RESPONSE TO NATIONAL CABINET PRINCIPLES

31 March 2020

On 29 March, the Prime Minister announced a “common set of principles” in relation to commercial leasing. The parties to this document understand that states and territories will implement these principles as they see fit, including through possible retail lease legislation.

In this regard, the parties to this document propose the development of an industry *Code of Conduct* as an option to implement the principles, which could be adopted by Regulation, and which could also facilitate a nationally consistent approach.

The parties to this document, representing key national retail industry groups and those that frequently engage on retail lease legislation, met on 30 and 31 March 2020 to discuss an agreed set of principles (hereafter referred to as “*Agreed Joint Principles*”) in response to the National Cabinet’s principles for the following purposes:

- (1) to ensure and present a united industry approach, including for the awareness of key policy makers,
- (2) to ensure a timely response, given issues are developing quickly, and to provide the basis for further discussion,
- (3) to guide further policy making in considering and implementing the principles, and
- (4) to encourage a common approach across all jurisdictions.

The *Agreed Joint Principles* simply respond to each Principle agreed to by the National Cabinet, and are collectively supported by the Australian Retailers Association (ARA), the National Retail Association (NRA), the Pharmacy Guild of Australia (PGA) and the Shopping Centre Council of Australia (SCCA).

We have also developed the following overarching and baseline principles:

OVERARCHING AND BASELINE PRINCIPLES

- Shopping centre owners and retailers have a mutual interest in business continuity.
- Some of the Principles (e.g. 2, 3 and 4) overlap, and thus cannot be treated in isolation.
- Landlords encourage retailers to approach them to discuss relevant issues and work towards agreed outcomes.
- Retailers agree they may need to provide accurate business records to landlords.
- The *Agreed Joint Principles* should apply temporarily, for as long as COVID-19 remains an issue.
- All landlords, premises and shopping centres are different, as are their commercial arrangements; it is therefore not possible to form collective industry positions, for example, on determining rent (which may contravene the *Competition and Consumer Act 2010*).
- All leases must be dealt with on a case-by-case basis, considering factors such as whether the tenant has suffered financial hardship due to COVID-19; whether the tenant is an SME; whether the tenant’s lease has expired or is soon to expire; and whether the lessee is in administration or receivership.

- Leases are legally binding agreements for a set period of time: all issues falling within lease durations must be considered on a case-by-case basis.
- Some leases have different structures and are at different stages: some leases are based on rent as a percentage of turnover; some lessees may already be in arrears; and some leases may already be expired and in “hold-over.”

AGREED LEASING PRINCIPLES

National Cabinet Principles

1. A short term, temporary moratorium on eviction for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress due to coronavirus.

ARA, NRA, PGA, SCCA: Agreed Leasing Principles

- The SCCA has already agreed to non-termination for non-payment of rent for SMEs.
- We support this principle and would be keen to help develop it further.

2. Tenants and landlords are encouraged to agree on rent relief or temporary amendments to leases.

ARA, NRA, PGA, SCCA: Agreed Leasing Principles

- Tenants and landlords are encouraged to agree on temporary rent assistance.
- This would need to be considered on a case-by-case basis.
- Tenants would need to provide relevant financial data and other business information to heighten the lessor’s understanding of the retailer’s capacity to pay during the affected period.

3. The reduction or waiver of rental payment for a defined period for impacted tenants.

ARA, NRA, PGA, SCCA: Agreed Leasing Principles

- Rent assistance (including in the form of rent deferral) would be for a defined period, with a focus on non-essential SME tenants, on case-by-case basis, facing financial hardship as a result of COVID-19.
- Tenants would need to provide relevant financial data and other business information to heighten the lessor’s understanding of the retailer’s capacity to pay during the affected period.
- Financial assistance could be based on the overall financial capacity of the retailer (in the context of its corporate group – i.e. the related bodies corporate test).

4. The ability for tenants to terminate leases and/or seek mediation or conciliation on the grounds of financial distress.

ARA, NRA, PGA, SCCA: Agreed Leasing Principles

- Termination as proposed is not supported, and we believe should not be progressed.
- Principles 2 and 3 are considered more balanced and important for landlords and tenants to continue working together.
- We support tenants being able to seek mediation from Small Business Commissioners on the grounds of financial stress as a result of COVID-19, with appropriate processes put in place, and to work together in good faith to reach a commercial outcome which ensures retailers resume trade and become financially viable within a defined recovery period.
- A unilateral termination right isn’t balanced, given a landlord’s inability to terminate for non-payment of rent, and is not linked to the obligation on both the lessor and the lessee to work together during the recovery period.
- While other principles apply to the short-term, this principle allows an entire lease, which may run for years beyond COVID-19, to be terminated. This does not encourage retailers to work with landlords and financial institutions to formulate a recovery plan.
- It is unclear what “financial distress” specifically applies to, and what financial hurdles would apply before a retailer could exercise this right.

5. Commercial property owners should ensure any benefits received in respect of their properties should also benefit their tenants in proportion to the economic impact caused by COVID-19.

ARA, NRA, PGA, SCCA: Agreed Leasing Principles

- We believe governments should reduce statutory charges such as land tax and council rates, which will be passed on to give relief to tenants during this period.

6. Landlords and tenants not significantly affected by coronavirus are expected to honour their lease and rental agreements.

ARA, NRA, PGA, SCCA: Agreed Leasing Principles

- Agreed, as per the terms of lease agreements. All parties should comply with existing leases, subject to the principles above.

7. Cost-sharing or deferral of losses between landlords and tenants, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance.

ARA, NRA, PGA, SCCA: Agreed Leasing Principles

- It is unclear to the parties what this means; however, we have advocated for and would support government assistance in relation to rent relief.

The parties to this document thank governments for any consideration of this document.

This document has been prepared in good faith, and on the basis of landlords and retailers continuing to work together to ensure business continuity.

Please don't hesitate to contact Russell Zimmerman, Executive Director, the Australian Retailers Association, or Dominique Lamb, Chief Executive Officer, the National Retail Association, on behalf of the parties.

Yours sincerely,



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