



Australia's property industry

Creating for Generations

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20 April 2020

Hon Dominic Perrottet MP
Treasurer
52 Martin Place
SYDNEY NSW 2000

**RE: Implementation of the National Cabinet Mandatory Code of Conduct for SME
Commercial Leasing Principles during COVID-19 crisis**

Dear Treasurer

I write in relation to the implementation of the National Cabinet Mandatory Code of Conduct (**the Code**) in New South Wales. This submission formalises the matters the Property Council has raised with you, your office and Treasury over the past few weeks. I very much appreciate the open and cooperative approach that has been taken in trying to work through the challenging issues the Code creates.

As an industry association which represents both tenant and landlord members, the Property Council shares the Government's intention of implementing this code in a manner which achieves fair outcomes for all.

The Property Council has greatly appreciated the Government's approach to working closely with industry in the development to a comprehensive response to the current crisis and the cashflow challenges currently facing both tenants and landlords.

The Property Council congratulates the Government on the \$440 million land tax relief package announced last week for residential and commercial tenancies in addition to the other support announced to date.

While landlords will now have some additional capacity to support tenants that have been adversely affected by COVID-19, the requirements that will now be imposed through the Code's implementation will stretch many property companies' financial viability.

After considering the contents of the Code and reflecting on how it can be best implemented in NSW, the Property Council offers the following advice. The comments below outline the industry's recommendations and highlights other areas where further clarification is required.

The Property Council recommends the NSW Government replicate the approach taken by the Queensland Government where six principles were established for commercial landowners to adhere to in order to be eligible for land tax relief. These six principles correspond with the key overarching and leasing principles outlined in the Code. We recommend these principles be mandated, via Regulation, but allow the remainder of the Code's principles to stand as an advisory best-practice guide rather than a legislated requirement. This will reduce regulatory complexity, reduce the length of time taken to achieve cashflow relief outcomes, and enable landlords and tenants greater flexibility to achieve mutually agreeable solutions.

The Code correctly identifies the unique nature of commercial leases and outlines the principle that leases must be dealt with on a case-by-case basis. In order to achieve this, it is imperative that the Government avoid establishing rigid proportionality conditions that limit flexibility for tenants and landlords. The Property Council strongly recommends that the proportionality rule outlined in Leasing Principle 4 be adopted as a best-practice guide rather than a mandatory requirement.

We trust that the following advice will be beneficial as the Government begins work on implementing this national Code.

THE CODE'S PURPOSE

» **Retrospective application should be avoided**

Many tenants and landlords have already proactively reached agreements in relation to rental relief during the COVID-19 crisis. There is concern in the industry that the implementation of the Code may result in these mutually acceptable agreements having to be renegotiated to adhere to new regulatory or legislative provisions.

Recommendation 1: The Property Council proposes that COVID-19 related good faith leasing agreements entered prior to 7 April, when the Code was endorsed to by the National Cabinet, should be exempt from the Code's application.

» **Establishing who are 'Qualifying tenants'**

While tenants should be able to easily produce documentation for landlords to establish their eligibility for the JobKeeper program, it will be largely unclear to landlords as to whether their tenants meet the turnover requirements that define an SME and make the tenant a "qualifying tenant." As such, tenants who believe they are eligible should be required to provide detailed and specific written notice and declaration to their landlord to this effect.

While initial eligibility for JobKeeper will enable landlords to begin the process of establishing cashflow relief for tenants, the tenant's eligibility may change from month to month. There is a level of industry concern about how long-term lease changes could be made given this uncertainty.

Recommendation 2: The Property Council recommends that how and when agreements be reviewed will need to be the subject of further consultation.

Recommendation 3: The Property Council recommends that the State Government provide guidance about the evidence that should be required, and what is the most reasonable time period for reassessments.

The Property Council notes that the Code calls for the principles to “apply in spirit” to all leasing arrangements for affected businesses, regardless of whether the business is a ‘qualifying tenant.’

Recommendation 4: The Property Council proposes that the Government should not attempt to legislate for principles to be applied “in spirit”, and instead focus on the Code’s application to qualifying tenants.

These principles can then be implemented by landlords with sufficient certainty to provide relief to other tenants in a non-mandatory manner as they consider appropriate.

Recommendation 5: The Property Council also recommends that the Government make clear that cash flow considerations will include all government income support as well as relief given on federal, state and local taxes, fees and charges.

All cash flows received by the tenant should be clearly included to determine what further relief is required from the landlord.

» **\$50m turnover ceiling for qualification**

It is not unusual in NSW for larger tenants to have leases with smaller landlords.

Recommendation 6: The Property Council seeks the Government’s consideration of an exception for small landlords dealing with large and multinational tenants.

Recommendation 7: The Property Council also encourages the Government to clarify that the qualifying turnover threshold applies to the tenant’s previous annual turnover and does not apply to tenants who may have had significantly larger turnover in previous years but have fallen below the threshold due to the current crisis.

Recommendation 8: Tenants with ultimate ownership by a foreign parent company should also be excluded from the Code’s application. We have collected a number of examples in NSW where a strict application of the Code would ultimately result in land tax relief being provided to foreign companies and foreign governments.

» **Treatment of ‘retail corporate groups’ and other large corporate structures**

The Property Council supports the principle that retail corporate groups should not be treated at the individual outlet level but instead regarded as part of their larger group. A similar grouping principle for large tenants should also be applied consistently across property types.

Recommendation 9: For industrial and office tenants that are part of a larger corporate group the threshold should be applied at the group level. The same treatment should also be applied to service trusts, which are commonly used by professional services firms to structure their occupancy and operational requirements.

» **Exemption for small commercial premises**

The application of this Code to all qualifying commercial leases is a significant regulatory undertaking. This is particularly the case for office and industrial leases, where the State Government has had no previous regulatory control. The scope of this intervention must be manageable for the State Government to implement, monitor compliance, and ensure fair and consistent application.

Recommendation 10: With this in mind, the Property Council proposes that the scope of the application of the Code be narrowed to exclude smaller properties (as well as smaller landlords – see recommendation 6 above).

Large and sophisticated tenants have been excluded from the Code's application in an effort to ensure that the protections put in place are targeted at smaller tenants with less capacity to absorb the economic impact of COVID-19 disruption.

Likewise, smaller landlords who may only own and manage a single office site, an individual industrial shed or a small retail shop, should not be expected to meet the same cashflow relief conditions for their tenants as large landowners will be required to meet under the Code.

The Property Council proposes that the Code only be applied to properties that have a value above \$50 million. This threshold is equivalent to the turnover threshold applied to qualifying tenants.

EXAMPLE:

A small heritage retail shop on the north coast is owned by a 'Mum and Dad' investor through a self-managed super fund. The tenant is a subsidiary of a multi-national company with an annual turnover of \$30 million and significant cash reserves.

The tenant can demonstrate that their turnover fell by 50% during the crisis and therefore warrants application of the Code's rent reduction measures. This compels the owner to waive at least 25% of rent, defer a further 25% of rent and charge no interest in relation to these amounts.

As a result of this reduction in revenue, the owner is unable to pay interest on its bank debt, which continues to accrue compound interest over the period of the pandemic. In this scenario the 'Mum and Dad' investor are carrying a significantly larger share of the cost of the crisis than the multi-national company with significant cash reserves.

» **Treatment of sub-tenants**

The Property Council is unclear about how the Code will extend to sub-lease and license arrangements, which are reasonably common and are expected to become more prevalent as the economic effects of the COVID-19 crisis continue to be experienced in the coming months.

Recommendation 11: Further clarity is required from the Government on how these arrangements will be affected by the Code. Licenses should be excluded from the Code.

» **Freedom to deal outside of the Code**

Recommendation 12: The Property Council recommends that landlords and tenants have freedom to make an informed choice to 'opt out' of the Code and make other arrangements not covered by the Code based on agreement between the parties.

LEASING PRINCIPLES

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

» **Pre-existing non-payment terminations**

While this principle provides warranted protection to tenants during this crisis period, there will be many instances where commercial landlords were in the process of terminating leases for non-payment of rent or other lease breaches that predated the current crisis.

Recommendation 13: To strike a fair balance between the protection of tenants and landlords, the Property Council proposes that this measure should be implemented in a manner that preserves a landlord's right to terminate a lease in respect of 'pre-COVID-19' breaches of lease by tenants. Put simply, action should still be able to be taken by landlords to resolve debts and other breaches that accrued or occurred prior to 31 January 2020.

» **Application in cases of insolvency**

Recommendation 14: This principle should cease to apply when a tenant becomes insolvent and therefore will be unable to trade post-crisis.

» **Application to leases due to expire during crisis**

When implemented this principle should allow for a landlord to compel a tenant to vacate if a lease runs its course during the crisis period.

Recommendation 15: The landlord should be able to require the tenant to vacate as it may have already committed the property to another tenant or have planned works at the property.

» **Application to leases being entered into during the crisis**

Recommendation 16: The Code should not apply to any leases being currently entered into during the crisis, as all parties are now aware of the risks facing tenants and landlords during the COVID-19 period.

» **Defining a 'reasonable recovery period'**

Recommendation 17: The Property Council recommends that the reasonable recovery period should be defined at 3 months.

» **Clarifying the definition of rent and other tenant payments to the landlord**

The Property Council notes that within these leasing principles 'rent', 'outgoings', and other payments from tenants to landlords are referenced.

Recommendation 18: Recoverable outgoings and other operating expenses should be excluded from the definition of rent and should not be subject to this proportionality principle. In many cases contractual obligations for landlords prevent operating expenses being reduced.

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.*

The Property Council strongly supports this principle and encourages the Government to ensure this concept is effectively enshrined.

» **Substantive terms / material failure definitions**

Further clarity will be required to determine what type of lease terms will be considered to be "substantive terms" for the purposes of this principle. While it is understood that obligations to pay rent and outgoings will not be regarded as substantive, other terms should continue to be enforced.

Recommendation 19: The Property Council recommends that these should keep premises in good repair, maintaining insurances and 'make good' provisions.

Recommendation 20: Any changes should also specifically carve out any right for a tenant to terminate the tenancy for 'frustration' and 'force majeure' during the duration of the COVID-19 pandemic period.

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.*

» **Calculating the reduction in tenant's trade**

The Code is not clear about when the calculation of the tenant's revenue reduction is to be made, and whether this calculation is to be made up-front and once only, or whether it is to be revised during the course of COVID-19 in line with changes in trade for those tenants that continue to trade.

Recommendation 21: Assuming the tenant has already met the threshold 'JobKeeper test'. the Property Council recommends that this assessment should be made on a net situation, based on the tenant's fall in profit during the crisis period. Tenants have widely varying business models, with many able to reduce costs sufficiently to offset a fall in turnover. It is the fall in a tenant's profit, rather than revenue, that should be used as the measure to determine the level of support that they require.

Recommendation 22: The Property Council also proposes that the Government should ensure that online sales are included in any measure of a tenant’s trade.

Recommendation 23: The Property Council proposes that the Government (with industry assistance) should issue a standard COVID Concession Application Form including checklist of info required, examples, standard spreadsheets, non-disclosure agreement, Stat Dec, Warnings on false disclosures, Warning that not providing the requested information will put the tenant outside of the Code, Helpline contact details, etc. Assessments must be based on Actual data, rather than forecasts. All tenants are already claiming for a 6 month period based on forecasts.

Recommendation 24: The Property Council recommends that a “true up” be mandated for the end of the 2020 calendar year based on externally audited accounts.

EXAMPLE:

The following theoretical examples of two similar size tenants demonstrate the disassociation between a fall in turnover and the tenant’s profit. The differing capacities of different businesses to reduce their expenses will have a significant impact on their requirements for rental relief:

TENANT A	Mar-19		Mar-20		
Revenue	\$	28,000	\$	12,000	-57%
Rent	\$	2,000	\$	2,100	
Operating expenses	\$	20,000	\$	18,000	-10%
Profit	\$	6,000	-\$	8,100	-235%
TENANT B	Mar-19		Mar-20		
Revenue	\$	40,000	\$	10,000	-75%
Rent	\$	2,000	\$	2,100	
Operating expenses	\$	30,000	\$	2,000	-93%
Profit	\$	8,000	\$	5,900	-26%

» **Treatment of gross leases**

For gross rent leases, where outgoings are embedded within the rent, clarification is required regarding what constitutes a “reasonable recovery period” or how it is to be determined, for this and other Leasing Principles.

- 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.*

» **Adoption as a best-practice guide**

Recommendation 25: As outlined earlier in this document, the Property Council recommends that this principle be adopted as a best-practice guide rather than a legislated requirement.

This will ensure that landlords and tenants have the capacity to negotiate flexible and mutually acceptable cashflow relief agreements on a case-by-case basis.

If the Government disagrees with that proposal, then an additional final principle could be added to retain some fairness and flexibility in any determination, as follows:

Recommendation 26: Draft final principle

Notwithstanding the other principles, the parties to a lease will also take into account the financial position of the landlord and the capacity for the tenant to continue to meet its obligations under the lease notwithstanding any reduction in the tenant's trade due to the COVID-19 pandemic.

Such factors to be taken into account include the effect of any waiver or deferral of rent will have on the landlord's ability to meet its own financial obligations, the general financial position of the tenant and related entities and any actions not necessitated by the COVID-19 pandemic but taken by the tenant that have caused or contributed to a reduction in the tenant's trade or inability to comply with its obligations under the lease.

Where it is inequitable for the landlord to comply with all of the preceding principles, the parties must act in good faith to agree suitable adjustments to the principles that will apply and for how long the revised arrangements will remain in place, taking into account the circumstances of each party.

» **Determining a tenant's capacity fulfil their ongoing obligations**

Clarification is required regarding the criteria to be employed in assessing a tenant's capacity to fulfil their obligations.

Recommendation 27: The Property Council recommends that, at a minimum, tenants seeking a reduction should be required to:

- a. Disclose the efforts made to access Government stimulus benefits, and where appropriate obtain concessions from franchisors;
- b. Disclose the steps taken to reduce the costs of the tenant's business, and to improve its revenues such as via online sales; and
- c. Disclose the financial capacity of the tenant and its key related parties.

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.*

» **Length of deferral term**

Office and industrial leases are commonly more than 10 years in duration. If deferred rent is amortised over the length of these leases, without interest being charged, this represents a significant loss for the landlord which far exceeds the principle of proportionality and an equal sharing of the economic cost of this crisis.

Recommendation 28: The Property Council recommends that the repayment period should be capped at 2 years unless otherwise agreed to by the parties. Any amortised rent should also be subject to any rent increases otherwise agreed under the lease (for example, fixed percentage or CPI increases)

» **If the lease ends before 24 months**

Provisions should allow for the landlord to retain the tenant's security until a reasonable period of time after the expiration of the amortisation period and all rent deferrals are paid.

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.*

» **Application in the context of land tax relief**

The Property Council notes that the announcement about the application of the Code in NSW included an announcement about land tax relief. The relationship between the relief and the Code is yet to be made clear.

Recommendation 29: The Property Council recommends that the government needs to ensure there is no 'double dipping' by tenants.

» **Treatment of gross leases and retail leases**

For gross rent leases, where outgoings are embedded within the rent, it is not clear how land tax or other statutory charge relief measures could be apportioned between tenants across a portfolio.

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.*

» **Redundant principle**

At the current moment Australian banks are only generally offering a deferment of loan repayments while capitalising interest. These deferrals will provide short-term cash flow relief but will increase the overall cost of funds for landlords, and thereby increase costs in the long term. Under these circumstances no benefits exist to pass through to tenants. In instances where a loan facility is provided to a landlord on a portfolio basis it may be impossible to determine any corresponding benefit that can be allocated to a specific tenancy within a specific asset.

Recommendation 30: The Property Council contends that this principle achieves no tangible outcome for tenants or landlords and should not be implemented.

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.*

» **Treatment of voluntarily closures**

Recommendation 31: In instances where a tenant has voluntarily chosen to close its office down, rather than been forced to by a Government directive, this principle should not be applied.

» **Appropriate waiver**

Some property expenses and outgoings will still be payable by landlords to third parties even if a tenant is not trading. For example, within a shopping centre, electricity costs for air-conditioning and lighting, the cost of cleaning, security, etcetera, will still be payable notwithstanding that some tenants are not trading. Clarification is required that if a landlord is required to pay an expense or outgoing, then the tenant is required to contribute its appropriate proportion of that expense or outgoing according to the terms of the lease.

» **Proportionate waiver**

Recommendation 32: Any waiver of outgoings should be applied on a proportionate basis, as per the proportionate waiver of rent under Leasing Principle 4, rather than a 100% abatement. It is not equitable to treat two types of occupancy costs in two different ways.

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.*

» **Length of repayment period**

Similar to the provision on the repayment of mandated deferrals, the Property Council notes that this principle is effective for short lease terms but will become problematic for long term leases common in commercial and industrial property where the term of the lease could be over an extended period.

Recommendation 33: As such, the Property Council recommends that the repayment period should be capped at 24 months (for consistency with the rental deferrals period). Repayments should be established as equal monthly instalments over the relevant period and a failure to pay such amounts should entitle landlords to draw on any security held as would ordinarily be the case for rectifying usual rental arrears.

» **Clarity on principle 9**

Recommendation 34: The Property Council understands this provision is to only apply to the repayment of non-mandated arrangements rather than deferred rent but seeks confirmation of this interpretation.

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.*

» **Provision for non-payment of deferred rent**

While there should be no fees, charges nor punitive interest associated with granting the deferral, consequences must be enabled to be put in place if the tenant does not go on to make the deferred payments in accordance with the negotiated repayment terms.

Recommendation 35: The Property Council recommends that where the tenant fails to repay deferrals in accordance with negotiated repayments, the landlord should be

entitled to charge fees, interest or other charges and/or take any further action it is entitled to (e.g. drawing on security) in accordance with the lease in relation to those failed payments from the negotiated due date.

Recommendation 36: Deferred rent should also be able to be effectively 'blended' with ongoing post-crisis rent payments for rent review purposes, such that the deferred rent component may be subject to annual rent increases and that this is not of itself considered a fee, charge or punitive interest contemplated by this 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.*

» **Treatment of pre-crisis matters**

While this principle applies necessary protection to tenants during this crisis period, there will be many instances where commercial landlords were in the process of drawing on a tenant's security for arrears that predated the current crisis.

Recommendation 37: The Property Council proposes that this measure should be implemented in a manner that preserves a landlord's right to draw on that security in instances of long-standing arrears or other breaches of the lease that are curable by the payment of money. This is especially the case in relation to repair and make good obligations. Put simply, action should still be able to be taken by landlords to resolve debts that accrued or occurred prior to 31 January 2020.

» **Flexibility for tenants**

Industry experience has been that some tenants may wish for landlords to draw on bank guarantee or a security deposit where it is favourable for the tenant to do so.

Recommendation 38: Flexibility should be allowed in the implementation of this principle to allow for tenants approve of this course of action.

» **Application to outgoings and other charges**

The principle only refers to rent and does not reference outgoings or marketing levies.

Recommendation 39: The Property Council recommends that this be implemented as written.

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.*

» **Avoiding conflicts with other contractual agreements**

A unilateral right for the tenant to extend a lease may place the landlord in conflict with other agreements already in place with a third party in relation to the same property.

Recommendation 40: The Property Council recommends unilateral rights not be granted to tenants.

» **Constituting lease extensions**

Recommendation 41: Any extension of a term under this provision should not constitute a new lease under the law but rather a continuation of the existing lease, and therefore not trigger any disclosure obligations on the landlord under the Retail Leases Act.

» **New FIRB thresholds**

If the Government does not accept the position that foreign tenants be excluded from the Code, then the new FIRB thresholds recently adopted by the Commonwealth need to be resolved.

- » If not changed, they will mean that many leases will require FIRB approval for a material change to a lease granted to a foreign person with a term that exceeds (or is reasonably likely to exceed – for example by way of options to renew) 5 years. This will require a substantial fee to be payable and up to a 6 month wait for an approval determination. We consider that this outcome is contrary to the underlying intent of the Code and undermines its efficacy when commercial agreements to vary rent and extend lease terms necessarily will require formal variations to leases in order to provide appropriate legal protection to the parties and underpin ongoing asset values. The Property Council strongly recommends that the NSW Government encourage the Commonwealth Government to consider providing an exemption for commercial leases from the new FIRB approval thresholds. The Property Council seeks clarification on how these requirements will be accommodated for affected leases.

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.

» **Application in respect to annual rental reviews**

Rent reviews typically occur annually. There is industry uncertainty about whether this principle prevents the commencement of an increase within the period of the pandemic (plus a reasonable subsequent recovery period), but allows any potential increase to commence after the end of that period, or whether the opportunity to increase is lost entirely for the year if the increase is due to fall within that period.

Recommendation 42: The rent increase should be implemented at the set time but if the rent relief is, say, a 30 per cent reduction in rent for a specified period, then the 30 per cent should apply to the increased rent.

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.

» **Protection for landlords who are required to reduce opening hours**

Noting our earlier comments on tenants who have voluntarily ceased to trade, the Property Council appreciates the rationale for this principle. In implementing this measure, the Property Council would encourage the Government to establish an equivalent protection for landlords who are required to close buildings or reduce services as a result of the COVID-19 pandemic. Tenants should not have a claim against the landlord under such circumstances.

EXAMPLE:

An office building may be required to temporarily close due to one of its contractors or tenants contracting COVID-19, or due to a government-mandated lockdown measure. In those circumstances, tenants would be precluded from accessing their premises, but should not be entitled to bring a claim against their landlord for breach of quiet enjoyment or other rights (express or implied) provided for under their lease arrangements.

DISPUTE RESOLUTION

» **Office of Small Business Commissioner (OSBC)**

We note the announcement concerning the role to be undertaken by the OSBC and the preservation of the usual tribunal and court dispute resolution pathways.

Whilst noting that the OSBC currently deals with a small number of non-retail leases we understand that these are at the smallest end of the market. The leases to now be covered not only are for amounts well beyond the current jurisdiction of the OSBC they also potentially include parties, on both sides, that are well beyond “small businesses”.

We have concerns about the risk of delays and the expertise of the existing OSBC dispute resolution service in relation to commercial and industrial leases.

Recommendation 43: We would welcome the opportunity to work further with the Government and the OSBC on how finalising a workable model and solution. This might include the short term employment of experts in commercial and industrial leases and/or the capacity for private dispute resolvers to be utilised should the parties agree.

» **Protections for landlords experiencing hardship**

Regard should be given for a landlord’s ability to provide additional rental waivers above 50 percent.

Recommendation 44: Landlords who cannot do so should be given adequate protection in any dispute resolution process. In addition, the additional principle (outlined at recommendation 26 above).

DEFINITIONS

- » While the Code has provided some definitions for specific terms, the Property Council contends that many other concepts will need to be defined to provide further clarity and certainty for landowners and tenants. It is critical that this be achieved at the outset of the legislation in order to prevent ongoing uncertainty and a plethora of tenant and landlord disputes over interpretative issues that would contribute to a lengthy, costly and unnecessary drain on court, tribunal and other public resources.

COMMENCEMENT/EXPIRY

» **Date of application**

The Property Council notes the National Cabinet’s intent for the Code to take effect from some date after 3 April 2020, and to remain in place for the period during which the Commonwealth *JobKeeper* program remains operational. The NSW

Government has also expressed an intention to move quickly to legislate to implement these protections.

Recommendation 45: Given the significant amount of uncertainty still to be resolved within the Code's implementation, the Property Council strongly encourages the Government to give the Code effect from the date of implementation rather than retrospectively applying the Code to an earlier date.

» **Sunset clauses**

Recommendation 46: The Property Council recommends that any legislative or regulatory changes to implement the Code are treated as a temporary response to a unique crisis. All changes should be made with a suitable expiry clause or review mechanism.

The Property Council would welcome the opportunity to work with the Government in developing an implementation plan for this Code. We would appreciate the opportunity to discuss these submissions with you before the Government finalises its position. Please do not hesitate to contact me if you have any questions in relation to the above advice.

Yours sincerely,



Jane Fitzgerald

NSW Executive Director

cc. The Hon. Gladys Berejiklian, Premier of NSW

cc. The Hon. Damien Tudehope, Minister for Finance, Minister for Small Business