

**COMMERCIAL TENANCIES (COVID-19 RESPONSE) BILL 2020**

*Committee*

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Adele Farina) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

**Clause 14: Terms used —**

Progress was reported after clause 13, as amended, had been agreed to.

**The DEPUTY CHAIR:** Members, we are dealing with the Commercial Tenancies (COVID-19 Response) Bill 2020. We have a supplementary notice paper 186, issue 3, dated today, 17 April 2020.

**Hon ALANNAH MacTIERNAN:** I move —

Page 12, line 15 — To delete the line and substitute —

(b) includes —

- (i) a code of conduct dispute; and
- (ii) a financial hardship dispute;

First, I will explain how all the proposed amendments on supplementary notice paper 186, issue 4, fit into each other and deliver the schema that we promised. We undertook during the second reading debate to make sure that there would be a capacity when there was doubt about whether financial hardship was being experienced by a tenant and the tenant was taking advantage of the moratorium on eviction to improperly advantage themselves. Originally, we set up a proposal that created a very separate mechanism for that sort of dispute. A number of concerns were raised about that. One was that it would undermine the schema of the entire bill because it made sure that all disputes would be funnelled through the process of conciliation to get to a resolution before going to the tribunal. These amendments will result in a much more elegant way of dealing with that issue.

We are adding a particular provision to the existing class of disputes set out in clause 14; that is, financial hardship. “Financial hardship” will be defined as a tenant who suffers due to one or more of the following: a restriction imposed by law; changes in societal behaviour—that is, no-one going out—and other consequences of the COVID pandemic. If a landlord believes the tenant is simply not paying rent and has no financial hardship, they can initiate a financial hardship dispute. Under the existing arrangements, the parties can either agree to go directly to the tribunal or, if that is not agreed, they are required to go through the conciliation process. If there is no successful conciliation, it can go on, provided the commissioner gives a certificate that the applicant has acted in good faith. The certificate can go to the tribunal and the tribunal can make a ruling. Amongst other things, the tribunal can make a ruling that the lease can be terminated. It is a way of stopping the concern that many members have raised that it is commercially available to a tenant who has suffered no hardship to avail themselves of the moratorium and have the advantage of not paying rent for six months and pay at the end of the six-month period. This is a much more elegant solution to that problem and, in my view, it addresses and discharges the undertaking we made to the opposition to ensure that such a provision is provided in the bill.

**Hon NICK GOIRAN:** I indicate to the chamber that the opposition has had only a few moments, really, to peruse and consider these amendments, but it does not oppose them and thanks the government for its work in this regard. We have some questions about some of the other proposed amendments, but in principle we support the amendments.

**Amendment put and passed.**

**Hon ALANNAH MacTIERNAN:** I move —

Page 12, after line 15 — To insert —

*financial hardship*, in relation to a tenant, means financial hardship suffered by the tenant as a result of 1 or more of the following —

- (a) a restriction imposed under a written law in response to the COVID-19 pandemic;
- (b) changes in societal behaviour in response to the COVID-19 pandemic;
- (c) any other consequences of the COVID-19 pandemic;

**Hon DIANE EVERS:** I just noticed that in this definition there are no parameters to describe hardships. Will the tribunal decide that? What might be considered hardship by one person may not be considered hardship by another.

**Hon ALANNAH MacTIERNAN:** We have left this broad. The very concept applies if the landlord is disputing and believes that there is no negative impact of COVID-19 being imposed—for example, if it was an industry that has in no way been affected by COVID-19. To some extent, this comes down to these tribunals, which are used to dealing in commonsense. We would presume that “hardship” means some negative impact or some financial loss

that has occurred because of COVID-19. That is not to say that there are not degrees of hardship. The concern that has been raised is that some tenants who have not been impacted by, suffered any losses from or had any problems caused by the COVID pandemic or the response to it may nevertheless seek to avail themselves of the six months' rent holiday.

**Hon NICK GOIRAN:** I have one comment and one question. My comment is that the definition of “financial hardship” is restricted to a tenant and does not incorporate the landlord. I do not criticise that, but I note at this early stage that the government has some appetite to support my amendment on the supplementary notice paper at 4/16 when we get to clause 16. That amendment seeks to put beyond doubt that the tribunal, when it is considering a matter, should have some regard—ultimately, it is a matter for the tribunal how much regard it has—for the financial position of the lessor. The language used at line 21 of page 14 is “landlord’s financial capacity”. On the basis that I understand the government has an appetite to support that amendment, I do not propose to take any further time interrogating why the definition of “financial hardship” is restricted merely to tenants. My question is: what is intended by the words “changes in societal behaviour”?

**Hon ALANNAH MacTIERNAN:** An example of “changes in societal behaviour” is that some people are not going out shopping. People are entitled to go out shopping but people are taking seriously the message to stay at home. Anyone who goes into any city or shopping strip will see that footfall traffic is probably one-tenth what it was before. It is not strictly mandated that people cannot go shopping in Western Australia; they can. They can go to David Jones, JB Hi-Fi, Seed Heritage or wherever they want to go, but people are adhering to the message to stay at home. Very quickly, on the member’s other point, bear in mind that the reason that the clause refers only to a tenant is that only the tenant has the protection of a moratorium against an eviction. It does not make sense to talk about the landlord’s hardship in this clause because the whole issue is about lifting the shield of the moratorium in cases in which there is no legitimate hardship. That is why it refers only to a tenant.

**Hon NICK GOIRAN:** I accept that but I note that a code of conduct dispute can include, without limitation, the dispute about the waiver or deferral of rent payable under a lease.

**Hon Alannah MacTiernan:** But we are not talking about a code of conduct. That is already there.

**Hon NICK GOIRAN:** I accept that and do not think we need to dispute it among ourselves.

**Amendment put and passed.**

**Hon ALANNAH MacTIERNAN:** I move —

Page 12, line 18 — To delete the line.

**Hon NICK GOIRAN:** I wonder whether the minister might consider seeking leave to withdraw this amendment because the line to be amended merely defines the word “tribunal”, which is the State Administrative Tribunal. That term is already used in part 5 and, indeed, the minister’s amendments on the supplementary notice paper also use the word “tribunal”. It is not apparent to me why we need to delete the word “tribunal”. I accept that the minister already has on the supplementary notice paper the foreshadowed amendment to insert the precise same definition under clause 3, “Terms used”. That would be applicable only if “tribunal” was to be used in various parts of the bill. Unless I am mistaken, I believe that the only time that “tribunal” is used is in part 5. If I am wrong about that, I will stand corrected.

**Hon ALANNAH MacTIERNAN:** I thank the member for alerting us to that. I seek leave to withdraw amendment 10/14.

**Amendment, by leave, withdrawn.**

**Hon ALANNAH MacTIERNAN:** I move —

Page 12, after line 18 — To insert —

- (2) For the purposes of this Part, a *financial hardship dispute* is a dispute between the parties to a small commercial lease in the following situation —
- (a) during the emergency period, the tenant has breached the small commercial lease by failing to pay rent or any other amount of money payable by the tenant to the landlord under the small commercial lease (including, without limitation, a requirement under the lease to pay all or any of the landlord’s operating expenses); and
  - (b) the landlord claims that the breach was not a result of the tenant suffering financial hardship; and
  - (c) the landlord has not granted the tenant a waiver, deferral or reduction in respect of the unpaid rent or other unpaid amount of money.

**Amendment put and passed.**

**Clause, as amended, put and passed.**

**New clause 14A —**

**Hon ALANNAH MacTIERNAN:** I move —

Page 12, after line 18 — To insert —

**14A. Relationship with s. 9**

Nothing in section 9 prevents a landlord from making a request to the Commissioner under section 17, or an application to the Tribunal under section 15, in relation to a financial hardship dispute.

This makes it clear that the prohibition on evictions does not stand in the way of an order being made after this full process has been gone through.

**New clause put and passed.**

**Clause 15 put and passed.**

**Clause 16: Tribunal's powers to make orders —**

**Hon ALANNAH MacTIERNAN:** I move —

Page 14, after line 10 — To insert —

(ca) if the proceedings relate to a financial hardship dispute — an order terminating the small commercial lease;

**Hon ALANNAH MacTIERNAN:** Under the existing provisions in the bill, it was not contemplated that there would be a termination of a small commercial lease, so this is introducing a whole new capability for the tribunal; that is, the termination of a small commercial lease in the event that we are dealing with a financial hardship dispute. Therefore, it was necessary to introduce this new order because this type of order was not contemplated under the original scheme of the act.

**Amendment put and passed.**

**Hon NICK GOIRAN:** With the understanding that the minister has foreshadowed that she does not propose to move the amendment standing in her name at 12/16, I move —

Page 14, lines 20 and 21 — To delete —

if relevant in accordance with the adopted code of conduct —

By way of a brief explanation to members, this does what I foreshadowed earlier and that is to put beyond doubt that under clause 16, if the tribunal is considering a matter, it should have some regard to the landlord's financial capacity. It clearly does that on multiple occasions for the tenant and it is simply a matter of fairness that the landlord's financial capacity also be considered, and this puts that beyond doubt.

**Hon ALANNAH MacTIERNAN:** We support the amendment.

**Hon DIANE EVERS:** My concern is that if these words are deleted, we will still be looking at a landlord's financial incapacity—in this case, impossibility—even when it is not COVID related. The reason for having that line in there is to say that we also need to look at the landlord's financial capacity if it has been affected by the emergency situation.

**Hon ALANNAH MacTIERNAN:** I am not sure, member, that that is true. We are recognising that there are many different landlords and some are landlords who might be of limited means and highly leveraged, and there may be others whose holdings are very large and who are long-term owners of land. Therefore, I do not necessarily think that it was an intention that the landlord's financial position necessarily needed to be COVID related; I think the intention was to make an assessment of where the line would be drawn between the interests of the landlord and the tenant, and that regard would be given to the financial position and capability of the landlord. I do not think it was intended that this amendment constrain that by the impact that was COVID-19 related.

**Amendment put and passed.**

**Hon ALANNAH MacTIERNAN:** I move —

Page 14, after line 24 — To insert —

(4A) In proceedings relating to a financial hardship dispute, the Tribunal —

- (a) cannot make an order under subsection (3)(ca), or any other order to the disadvantage of the tenant, unless satisfied that the tenant's breach was not a result of the tenant suffering financial hardship; and

- (b) must make an order under subsection (3)(d) if satisfied that the tenant's breach was a result of the tenant suffering financial hardship.

**Amendment put and passed.**

**The DEPUTY CHAIR (Hon Adele Farina):** The minister has indicated that she will not be moving her amendments at 13/16 and 14/16.

**Clause, as amended, put and passed.**

**Clauses 17 and 18 put and passed.**

**Clause 19: Commissioner may intervene in Tribunal proceedings —**

**Hon NICK GOIRAN:** What criteria will be used to guide whether or not to intervene? This is one of the questions on notice that I provided.

**Hon ALANNAH MacTIERNAN:** The following information has been provided by the Small Business Development Corporation. The power to intervene allows the Small Business Commissioner to make an application to intervene in a small business matter before the State Administrative Tribunal. The SAT will decide whether to approve the application. There is no inherent duty for the commissioner to intervene and it is anticipated that this would occur only in exceptional circumstances. The commissioner may intervene when it is in the public interest to do so and when the commissioner considers his expert opinion would be of benefit to the SAT. It simply gives the commissioner the right to be heard in that process. I understand that the intervention is not to stop the action, but to provide the commissioner's advice.

**Clause put and passed.**

**Clause 20 put and passed.**

**Clause 21: Regulations —**

**Hon NICK GOIRAN:** I have three remaining questions, all of which have been given on notice and relate to part 6. I propose to ask all these questions under clause 21, with the minister's concurrence. What regulations are intended to be prescribed under this power under clause 21? Is clause 22 a Henry VIII clause? With regard to clause 23, what regulations are intended to be prescribed under this power?

**Hon ALANNAH MacTIERNAN:** This clause is not a Henry VIII clause. It does not intend or give the capability to act outside the four corners of the bill. There are extraordinary circumstances that require some flexibility in the making of the regulations. Any regulations will be used to address anomalies in the application of the act and to move the requirements that are no longer required. The regulation power is significantly constrained by the requirements of clause 22(2). In particular, the recommendation of the minister can be made only if the minister is satisfied that the provision is no longer required or should apply in a modified manner in order to respond to the COVID-19 pandemic. This limited regulation-making power is to provide some flexibility so the objects of the act are not undermined. Any regulation would not be inconsistent with the act; to the contrary, it would be to ensure that the act continues to provide an appropriate response. The regulations are required to be published in the *Government Gazette* and will be reviewed by the Joint Standing Committee on Delegated Legislation and are disallowable by the Parliament under section 42 of the Interpretation Act 1984.

**Clause put and passed.**

**Clauses 22 to 24 put and passed.**

**Postponed clause 3: Terms used —**

Resumed from an earlier stage of the sitting.

**The DEPUTY CHAIR:** Does the minister intend to move her amendment at 5/3?

**Hon Alannah MacTiernan:** No, I will not.

**Hon DIANE EVERS:** Something occurred to me as we were previously going through this clause. Under the definition of "small commercial lease" at paragraph (d) it states "any other lease". Can I have some clarification on whether that might include a class of tenant such as those who are not running a business but are renting a commercial premise for a hobby such as music or art, or possibly for a not-for-profit business that is not incorporated under the Associations Incorporation Act?

**Hon ALANNAH MacTIERNAN:** The term "small commercial lease" is used. If it is not a small commercial lease, that arrangement is not necessarily caught by the legislation. If that sort of problem emerges, we can then introduce an additional class of small commercial lease under paragraph (d).

**Postponed clause put and passed.**

**Title put and passed.**

*Report*

Bill reported, with amendments, and the report adopted.

*Third Reading*

Bill read a third time, on motion by **Hon Alannah MacTiernan (Minister for Regional Development)**, and returned to the Assembly with amendments.

*House adjourned at 10.18 pm*

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