

COMMERCIAL TENANCIES (COVID-19 RESPONSE) BILL 2020

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Alannah MacTiernan (Minister for Regional Development)**, read a first time.

Second Reading

HON ALANNAH MacTIERNAN (North Metropolitan — Minister for Regional Development) [3.06 pm]:
I move —

That the bill be now read a second time.

The bill I am introducing today is essential to support the continuity of commercial tenancies, during what is likely to be a period of significant social and economic upheaval for all Western Australians. The social and economic health and wellbeing of Western Australians is the government's highest priority as we face the significant challenges presented to us by the spread of COVID-19.

On 29 March 2020, the national cabinet announced that a moratorium on evictions for non-payment of rent would be applied across commercial tenancies impacted by financial distress due to the COVID-19 coronavirus pandemic. On 3 April 2020, the national cabinet announced a set of common principles to provide protections and relief for tenants in relation to commercial tenancies, and on 7 April 2020, it endorsed the mandatory code of conduct, the National Cabinet Mandatory Code of Conduct for SME Commercial Leasing Principles during COVID-19, aimed at mitigating and limiting the hardship suffered by the community as a result of the spread of COVID-19 in our state.

This bill introduces a moratorium on evictions for commercial tenancies and incorporates a range of other measures to provide urgent relief for commercial tenants in response to the COVID-19 pandemic, including a mechanism for the introduction of a code of conduct for landlords and tenants. The bill will introduce a six-month moratorium on termination for certain breaches; a freeze on rent increases; a restriction on penalties for tenants who do not trade or reduce their trading hours; a prohibition on landlords charging interest on rent in arrears; a prohibition on landlords making a claim on any form of security for the performance of the tenant's obligations under the lease, for example, a bank guarantee or security deposit; and a prohibition on landlords progressing proceedings against a tenant for a breach that occurred after the COVID-19 restrictions were implemented, but before the new laws come into operation. The new provisions will apply to a broad range of small commercial tenancies for six months. This period may be extended as necessary. The bill enables a regulation to be made to adopt a code of conduct. This provision will provide the mechanism for the adoption of a code of conduct based on the National Cabinet Mandatory Code of Conduct for SME Commercial Leasing Principles. The bill allows for the code to be adopted in whole, in part, or with modifications. The national code of conduct imposes a set of leasing principles on landlords that apply to certain commercial tenancies when the tenant is suffering financial stress or hardship as a result of the COVID-19 pandemic. The code of conduct requires landlords and tenants to negotiate in good faith and agree to measures for the provision of rent relief. The rent relief granted by landlords should be proportionate to the losses suffered by a tenant due to a reduction in trade. The relief provided for by the code of conduct can be a combination of waiver and deferral. The code introduced into Western Australia will reflect the principles of the national code but will take into account Western Australia's circumstance. The code will be introduced by way of regulation and will be a disallowable instrument.

In addition, the bill includes dispute resolution provisions to deal with disputes between parties arising out of the operation of the act, including a code of conduct dispute. Mechanisms are included so that smaller businesses can seek the assistance of the Small Business Commissioner in conciliating or mediating disputes. Further, during the emergency period, a party to a dispute may apply to the State Administrative Tribunal, which may make any order that it considers appropriate to resolve the dispute or proceedings. Since its introduction into the other place, discussions and negotiations have taken place in relation to tenants who may abuse this moratorium. As a result, substantive amendments have been prepared and will be proposed during Committee of the Whole House.

I urge members to support this bill in the spirit of a unified parliamentary effort to deal with the economic impacts of this unprecedented public health emergency.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

The government has not entered into an intergovernmental agreement that is given effect by this bill. Through the national cabinet, the government discussed with other states and territories and the commonwealth the need to act to address the impact of the COVID-19 pandemic on, amongst other things, commercial tenancy. The outcome of these discussions was in-principle agreement to high-level policies; it did not involve an intergovernmental agreement

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committing to a uniform legislation scheme. Although the national cabinet developed a code of conduct, this code is not adopted by the bill. Instead, the government will develop its own code tailored to the Western Australian context, using the national code as a starting point and ensuring consistency with its underlying principles. The manner and form of legislation is a matter for each jurisdiction. In fact, the approaches for implementing the policies discussed at the national cabinet differ across jurisdictions.

I commend the bill to the house and table the explanatory memorandum.

[See paper [3809](#).]

HON NICK GOIRAN (South Metropolitan) [3.13 pm]: I rise as the shadow Minister for Commerce and lead speaker for the opposition on the Commercial Tenancies (COVID-19 Response) Bill 2020. What has transpired today and what is transpiring with this bill is nothing but a shambles. The opposition will not oppose the bill before the house only because it is ultimately an initiative that arises from the national cabinet. Those people who form the national cabinet are the people with all the information on this global pandemic at their disposal. They have decided that some form of code with respect to landlords and tenants needs to be brought into each jurisdiction of our nation. They are the people with the information, not the members of this house. It is for those reasons that we will not oppose the bill, but we cannot, in all good conscience, lean our shoulder to the support wheel for this bill in circumstances in which the first time that I received the second reading speech of this bill proposed by the government was literally minutes ago.

A plethora of stakeholders are interested in and watching this debate. It may interest those stakeholders to note that the purpose of a second reading speech, delivered by whoever is in government with carriage of the bill, is to establish the policy of the bill. It is a key document used by courts of law in our state to determine the interpretation of a bill, yet in a matter of this significance, the opposition received the second reading speech only minutes ago. Stakeholders might ask: “Why is it significant that this was provided only minutes ago? Is that the ordinary custom and practice of parliamentary procedure? Is this how laws are routinely made?” I regret to inform those people that this most certainly is not how laws are ordinarily made in Western Australia. In fact, this is, indeed, unprecedented. People will equally say that we are experiencing a pandemic. Nevertheless —

Hon Darren West: It is a state of emergency.

Hon NICK GOIRAN: The honourable member indicated that it is a state of emergency; indeed, that is true. It has been declared by his government and we understand that it has been a declaration of necessity. What is not necessary is to provide information to lawmakers minutes before they are asked to agree to it. What is not necessary is for draft bills on the matter before the house to be provided to me, as shadow minister, two days ago at 9.45 am. As I say, this is highly irregular. It is ordinarily the case, particularly for members of this chamber, to receive a full calendar weeks’ notice on the materials before the house. Normally the minister will read her second reading speech, table the explanatory memorandum and provide the bill, which would then be digested by all members of this house for a full calendar week. Instead, we have had minutes to consider those things. In addition to normally having a week to digest this type of matter, members would ordinarily have had the benefit of the entire transcript of the debate from the other place to ascertain what amendments might have been made, what matters might have been agreed to by the government, what points were raised by the opposition and where there are flaws in the legislation. All of that happened yesterday. Ordinarily for members in the other place, there would be a three-week window to digest the proposed law. Instead, this has all happened in the space of just over 24 hours. I hope that stakeholders understand that what is taking place at the moment is highly irregular. The member from the government might well say that this is a state of emergency, and he is correct, but it does not mean that lawmakers should be given effectively no notice of the laws that they are expected pass.

The final point I will make is that it is the government that has recalled Parliament. We were here yesterday and today to handle bills at the request of the government. The government decided that Parliament should be recalled. If the government is not in a position to provide information to members or lawmakers, it should not recall Parliament until it is ready. We know that the government has absolutely not been ready because of not only the shambolic nature of the bill just before the house, but also this matter here. Some stakeholders might think that I am lacking in charity for the government because it gave me the draft bill two days ago at 9.45 am. But the bill before the house now does not include the three or four pages of amendments that have been provided. When is there an opportunity for the lawmakers to consider the content of this bill and the amendments—to research the matters, to speak to stakeholders, to find out whether there will be any unintended consequences? There is none. Why is that? It is because we are operating under the battering ram conditions of the temporary order that the government insisted on. I note that there are now two hours and 53 minutes left on the clock before the guillotine will be applied to debate on this bill. I hope that stakeholders who have a significant interest in this matter understand that that is the context under which the opposition and all the non-government parties are operating in this place.

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With regard to the government's rhetoric on this bill and the policy of this bill, I note that on 3 April this year the Premier, Hon Mark McGowan, member for Rockingham, was quoted in *Business News* saying —

“Many tenants, many businesses have had their incomes collapse ... Commercial rents should reflect that simple fact.

“Rents will have to come down, it is as simple as that.”

My first question to the minister who has carriage of the bill this afternoon is: does this bill do what the Premier said? Will rents have to come down? Is it as simple as that?

I also note that the Premier was one of the co-authors of a media release on 14 April. The Premier's media release states that the bill before the house —

... will introduce a moratorium on evictions for small commercial tenancies and provide a range of other measures to offer support for tenants in response to COVID-19, including the introduction of a code of conduct for landlords and tenants.

I have four questions arising from that statement by the Premier on 14 April, and I direct them to the minister with the carriage of the bill. First, how long is the moratorium on evictions that the government says this bill introduces? Second, which small commercial tenancies will receive this eviction shield? Third, what are the range of other measures to offer support for tenants in response to COVID-19 that the Premier says this bill introduces? Lastly, what is contained in the code of conduct for landlords and tenants that the Premier says this bill introduces? Is it the code allegedly agreed to by the Premier in the national cabinet or is it some other altered version of the code? I look forward to the answers from the minister with the carriage of the bill in her reply to the second reading debate.

The irony is not lost on me that the national cabinet's mandatory code has a number of overarching principles. Those principles are in there to guide the rental arrangements between landlords and tenants. Members will get a flavour for the spirit within that national code when they read it and see statements such as —

Landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period.

Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes.

Landlords and tenants will negotiate in good faith.

Landlords and tenants will act in an open, honest and transparent manner, and will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code.

Let members consider those points, that spirit of the code, and contrast that with the way this bill is being handled today. Is it being handled in an open, honest, transparent manner with sufficient and accurate information within the context of this matter? Is it being negotiated in good faith? Are we working together towards achieving mutually satisfactory outcomes? Is there capacity to discuss relevant issues without a guillotine hanging over our head? Is there capacity to negotiate? Are we really sharing a common interest in working together? These are the principles in the national cabinet's code that the Premier, Mr McGowan, said he has agreed to, yet during the lawmaking of Western Australia, we do the opposite; we have a process of bad faith, material is provided at the eleventh hour and additional amendments are provided by the government as matters are on foot.

I indicate to members that as a gesture of good faith on my part, in advance of today, I provided the government with all my questions for the Committee of the Whole House process. I indicated, through the minister with carriage of the bill, Hon Alannah MacTiernan—as I said in an earlier debate, the dialogue between the two of us has been professional and courteous, and I thank her for that—that I have questions about clauses 1, 2, 3, 4, 8, 9, 13, 19, 21, 22 and 23. In addition, members will be aware that I have a small number of amendments on the supplementary notice paper, which are consistent with some of the significant feedback that I have received from stakeholders in this field. For the benefit of those stakeholders, I do not know whether there will be time for me to ask those questions, notwithstanding the fact that I have given the government notice of those questions, because there is a highly irregular and enormous guillotine hanging over my head in the form of a battering-ram temporary order.

I conclude by indicating that the opposition is not going to oppose this bill on the basis that it is an initiative arising from the national cabinet as a result of the global pandemic. However, we will not be providing our full-throated support for a bill that appears to significantly deviate from the national cabinet decision. It appears to have holes that expose landlords in particular to the risk of abuse and it appears to be premised on the assumption that all landlords are wealthy. It has been rammed through the parliamentary system in a manner that, quite frankly, a dictator could be proud of. I call on the government to provide direct and concise answers, particularly to the questions

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I have given in advance of today, in the Committee of the Whole House to demonstrate the very good faith that it is demanding of Western Australian landlords and tenants.

HON RICK MAZZA (Agricultural) [3.27 pm]: I must say that the Commercial Tenancies (COVID-19 Response) Bill 2020 concerns me greatly as far as the commercial tenancy industry is concerned. The bill has 24 clauses. It will introduce a six-month moratorium on evictions due to non-payment of rent; a freeze on rent increases; a restriction on penalties for tenants who do not trade or who reduce their trading hours; a requirement for landlords to pass on to tenants any reduction in or rebate on any state tax, such as land tax, by way of a reduction in payable outgoings, which I think they are required to do by law anyway—variable outgoings should reflect exactly what it costs a landlord—so I do not know why we need that provision in the bill but, in any case, it is; a prohibition on landlords charging interest on rent arrears; and a prohibition on landlords making a claim on any form of security, such as a bank guarantee or security deposit, for the performance of a tenant’s obligations under their lease. I am extremely worried about the circumstances surrounding what is proposed in this bill. Yes, there is a lot of pain out there in the community—a huge amount. Some businesses that have closed will probably never reopen and it could take years before landlords who have lost tenants are able to re-let their commercial or retail premises. When we have a bill that has nothing in it at all to support landlords, that concerns me. A landlord and a tenant are supposed to negotiate rent relief proportionate to the business loss. Can members imagine the amount of conflict that will create between a landlord and their tenant? The tenant may say that they are down 30 per cent, and the landlord will say, “Show me your figures.” The arguments are going to be brutal when dealing with this issue. It is easy to say that we have to be fair and equitable and people should negotiate, but we are talking about people’s livelihoods here. This is not \$300 or \$400 a week rent; this is people’s livelihoods. It could be rent of hundreds of thousands of dollars a year. Landlords may have mortgages against those properties, along with other outgoings, which may force them into financial difficulty or potentially bankruptcy. I know it is probably not advisable for or consistent with this bill, but I am hopeful that the government into the future will look at the need for land tax relief. For many commercial properties, even for those small businesses with a threshold of, I think, \$50 million, land tax can run into tens of thousands if not hundreds of thousands of dollars. At the very least, the tenant gets a benefit, because they have a reduction of the land tax cost in their variable outgoings that they have to pay as part of their lease. In the event that a landlord does not have a tenant, the landlord is responsible for the payment of those variable outgoings, because they do not have a tenant to pay for them. If there is land tax relief, at least the landlord gets some relief on the costs of holding that property vacant. As I say, in many cases, particularly in the environment that we are in now, it could take years to find a tenant, and the landlord has to hold that property and pay the rates, insurance, land tax and all the other outgoings associated with the property. I am really worried that we are creating an environment for extreme conflict, notwithstanding the intention of the government, which is to try to provide some relief for small businesses by trying to iron out and soften the blow.

I know that we are limited in time today. I have not had time to go through this bill thoroughly and look at every aspect of it. Like others, I have been bogged down dealing with the other three bills that we dealt with yesterday, together with the substantial Residential Tenancies (COVID-19 Response) Bill 2020 today, which we have not yet completed because we have run out of time, and now we have to shift to the very complex area of commercial and retail tenancies.

Tenants and landlords can try to get their issues resolved at the State Administrative Tribunal, but, again, that is going to cause conflict. We are looking at considerable damage in the commercial environment as we move forward from here. I have to say, I do not think that the provisions within this bill are going to help that much at all. In particular, nothing has been put forward as far as the regulations are concerned, so we do not know what the code of conduct will be. A lot of this is very important. The code of conduct on this bill, which gives guidance on how tenants and landlords are supposed to deal with this, is extremely important, but we are flying blind. We have not seen it. We do not know what that code of conduct is.

To give members an idea of some of the pain that is out there, a lot of self-funded retirees are relying on rental income to survive. We are talking about taking away their livelihood as much as a business’ livelihood. I read a post on the Premier’s Facebook page last week that said —

... I own a commercial rental property I also have a home mortgage as well as owing money on the commercial property. I was working and my income from the rental and from my job was paying for this. However now I’m not able to work so no income and the government is saying I have to try to halve the amount my Tennant is paying as well as pay both mortgages. I can’t get help from Centrelink as my taxable income from the last financial year is too high and will have to wait until the next tax Year summery before I can get any help. I’ll be bankrupt! How is this helping me? What are you doing for people like me? How am I going to survive? I’m not rich. I’ve taken a gamble in life to be self sufficient and not rely on the government for payments and now I’m forgotten!

I think that sums up where a lot of people are in these circumstances. That is why I am very disappointed that there is nothing in this bill to support landlords. The difference between commercial and retail tenancies and residential

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tenancies is the complexity and diversity of commercial lease arrangements. They vary greatly. I note that the bill places a prohibition on landlords making a claim on any form of security for the performance of the tenant's obligations under the lease; for example, a bank guarantee or security deposit. Quite often, leases are taken out in the name of a proprietary limited company—a two-dollar company that the accountant has pulled off the shelf—and operates as “XYZ Pty Ltd”. Landlords will generally want personal guarantees to guarantee the probity of the lease that they are entering into, because they want some security. The minister might be able to advise me in committee whether this bill will prohibit a landlord from pursuing the tenant personally for recovery of the debt against that lease when a defaulting tenant is not going to open their business again—it is all over; it is finished—and there are two, three or five years to run on the lease. Also, why is there a prohibition on accessing bank guarantees or deposits? Quite often, tenants will pay three months of rent as a deposit in case they default. If the tenant is unlikely to return, why can the landlord not access that bond? I do not want to hold up the house too much as I know that other members want to speak, but hopefully we can have some questions answered during Committee of the Whole.

HON ROBIN SCOTT (Mining and Pastoral) [3.36 pm]: My brain is still smoking from the Residential Tenancies (COVID-19 Response) Bill, but the Commercial Tenancies (COVID-19 Response) Bill 2020 allows a Mack truck to drive through the changes to contracts and agreements! My main concern is for the self-funded retirees who have commercial properties. Older self-funded retirees around my age will probably weather this, but I am more concerned about young people. Most people do not decide to become self-funded retirees when they are 50 or 60 years old. This decision is usually made when people are in their 20s or 30s. Some people manage to get into a commercial property, which in most cases costs more than their own residential home. They are in their most vulnerable position for the first five or 10 years in terms of their likelihood to fail, but if they have good planning and financial planning has been done properly, people mostly manage to sail through this danger period. But no matter how good one's plans are, nothing would have prepared commercial landlords for this COVID-19 response bill. The bill orders landlords to cut rent and provides no allowance to recover this loss in the future, so it is unfair at best. New commercial landlords must be feeling hopeless as we speak. They know that they will sink very fast and no-one is throwing them a lifeline. Already, the big players—the renters—are bullying and threatening their landlords. Some of the big players are suffering and may drown due to the COVID-19 crisis. Sadly, they appear to be quite prepared to take their landlords with them. This bill does little to save the landlords. To conclude, with this bill I feel I am being forced to sign a contract that I have never seen, and I am struggling to decide whether to support it.

HON AARON STONEHOUSE (South Metropolitan) [3.38 pm]: I think the word used by one of the previous speakers to describe this debate was quite apt, and that word was “shambolic”. It has been an absolutely shambolic and chaotic process today, and I refer to the debate on not only the Residential Tenancies (COVID-19 Response) Bill but also this bill, the Commercial Tenancies (COVID-19 Response) Bill 2020. This is the first chance many members have had to range over this bill in any great detail. We were provided the bill on Tuesday, if we were lucky; with briefings of 30 to 45 minutes, if we were lucky. We spent all day yesterday debating other priority legislation, we have spent this morning debating the residential tenancies bill and now we are expected to debate and vote on a bill that most of us have not had the chance to read yet. It is quite disgraceful. Normally, as pointed out by a previous speaker, we would have at least a week, once the bill is laid on the table, to consider the bill, consult with stakeholders, do our research, prepare notes and come back ready to debate and vote on the bill. We have not been afforded that opportunity. Of course, it is an emergency; it is a crisis. The normal procedure is being done away with because it is a crisis. Normally, an emergency like this brings out the best in everybody. It brings out the best in our community when we are in a crisis, and I think that has been the case out in society. If we look around Perth we will see that most people are banding together and helping each other out. They are being charitable, they are maintaining their social distancing and doing the right thing. This crisis has not brought out the best in government; it has brought out the very worst in government. We have seen a very brute force approach to legislation so far. It was pointed out by a previous speaker that the government has brought us back here today, and it has done so under circumstances in which it is not ready to debate its own bills. It is not just members of the opposition and the crossbench who are not ready, but also the government is not ready. That is evidenced by the fact that we have a supplementary notice paper that most members have not had a chance to turn their minds to. We have not had a briefing on it. I am aware of another commercial tenancy bill that is sitting in the other place right now. I have no idea what that is about. No-one has told me about it. I only found out about it because I saw it in the uncorrected *Hansard* of the debate yesterday. I have no idea what that bill is about. I do not know whether that will be brought on for us to consider today or whether we will be brought back next week to consider that bill. Is it supplemental to what we are debating right now? Is it something separate?

Hon Stephen Dawson: Honourable member, I can indicate that it is not.

Hon AARON STONEHOUSE: It is not? Thank you.

Hon Stephen Dawson interjected.

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Hon AARON STONEHOUSE: I thank the Minister for Environment, because that is the first indication I have had from anyone in the government that that bill even exists. I had to find out about it by reading the uncorrected *Hansard* from the other place.

Hon Nick Goiran: If it helps, honourable member, I'm the shadow Minister for Commerce and I found out the same way you did.

Hon AARON STONEHOUSE: The shadow Minister for Commerce found out the same way.

This bill seeks to provide some kind of relief for economic hardship for commercial tenants. The problem with the approaches we have been taking today towards relief for economic hardship is that we are not relieving anything. We are merely shifting that burden from one person to another, from one class of people to another—from tenants to landlords, from commercial lessees to commercial lessors. We have not solved any of society's problems caused by the restrictions imposed on us to mitigate the effects of COVID-19. We are merely shifting them from one person to another. We are not solving anything. If we are providing any relief, it is only temporary. It is only a deferral until this emergency period is over and then the cold hard reality will come home to us again and people will be in the same position as they were before. We are trying to provide relief by controlling prices, by telling lessors how much rent they can charge to their lessees. No-one in government has any idea what rent should be, because it is made up of multiple factors and multiple commercial decisions that we can only try to scratch the surface of. What goes into commercial rent—insurance costs, utility costs, investments in upgrades and renovations? Myriad things. The decisions that a commercial lessor has made in their own personal life may impact what rents they charge to their lessees. Maybe that lessor wants to go on a holiday at some point. Maybe they are trying to fund their own retirement. Maybe they are putting kids through university. There are so many different factors that go into what makes up a price that the government could not possibly understand. Trying to impose prices on lessees and lessors, in this case, is a really dangerous road to go down. In fact, we are trying to do it through changing the terms of contracts.

I said this during the residential tenancies debate: changing a contract is a pretty nasty thing to do in normal circumstances. The government is saying of an agreement someone entered into with someone else, consensually and in goodwill, "We're going to go along and change that, because we think we know what's better and what the terms of the contract should be for those two parties than they know for themselves." In this case we are going further; we are doing it retrospectively. Again, we are going back in time and saying that certain aspects of the agreement they made are no longer valid. In fact, decisions that people may have made that were lawful decisions based on the law at time, based on the contracts that they signed, will no longer be valid. People will have inadvertently initiated a course of action that is now illegal if they have initiated a course of action on or after 30 March. We are going back in time and saying, "Hang on, you can't do that", or "What you've done is illegal", and people will have to change their decisions again. That is a very difficult position in which to put people who make commercial decisions, when legislators and the government do not have information at hand and cannot understand it.

What has made this more difficult for us as legislators today is that not only have we not had a real opportunity to range over this bill and consult with stakeholders and be expected to make a decision about something we really do not understand, but also many of the provisions of the bill are going to be implemented through a code of conduct. We have not seen that code of conduct. We could read the national cabinet code of conduct, but the minister has made it clear, according to the second reading speech —

The code introduced into Western Australia will reflect the principles of the national code but will take into account Western Australia's circumstance. The code will be introduced by way of regulation and will be a disallowable instrument.

The code of conduct that the national cabinet has agreed to is not the code of conduct that we will adopt. What is the code that we will adopt? We do not know. We are voting not just ignorantly but completely blindly. We have no idea what the code is going to be. Now, of course, it will be a disallowable instrument, and that is good. I am glad that there is at least some veto power for Parliament, but that is only good as long as we are here. If Parliament is suspended and we do not return until 12 May and a code of conduct is tabled at a time when we do not have an opportunity to disallow it, that veto power will be useless. We are voting on adopting a code of conduct that we have not seen, that we will not see perhaps for some time and we have no idea what it will contain.

Some people out there are owed relief. I think it is only fair that some people receive the relief that they will receive. We have said to some businesses that their business must shut down; their business is illegal at this time thanks to COVID-19. They have had to close their doors; they cannot have any customers and that means no turnover. Those people are in a really tough position. How do they pay their commercial rent for a commercial lease when they have had to close the doors of their business? They cannot. The government has forced them to close their doors. They need some kind of help, obviously. It is through no fault of their own that their business has been closed. But

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what is the best way to provide relief to people in these situations? Is it by offloading the cost of government restrictions from one person in society to another, or should the government in this case be digging deep into its own pockets to provide that relief? After all, it is the government that has imposed those restrictions on those businesses. If we are going to provide relief to these people, we should be looking at ways that government can respond rather than abrogating our responsibility of providing relief to those people and transferring it onto other people out there in society. Some suggestions have already been made—land tax, stamp duty and payroll tax relief. There are so many costs imposed by government on business already and there are so many areas in which the government could tighten its own belt. Maybe it could do with a little less revenue for a short time to provide that relief rather than again offloading that cost from one group of people to another.

We may get out of this emergency period, however long it lasts—of course, the government could keep extending that emergency period if it liked—and find that all these commercial lessors have become insolvent; they are all going to have to go under and are going to have to sell their properties and, I do not know, apply for the pension. What kind of position will these self-funded retirees who are commercial lessors be in? Will we be looking at another set of bailouts at the end of this emergency period when all these debts come home to roost?

I absolutely have no idea whether I can support this bill because I have not yet had a chance to properly look at it. On the face of it, with its interference in commercial activity, its retrospective aspects, its interference in private property and in contracts, it certainly does not sound like the kind of bill that I would support, but again I have no idea. We will have to see what comes out of the Committee of the Whole House, but by that time I doubt we will have enough time to range over the clauses of this bill.

HON DIANE EVERS (South West) [3.49 pm]: I am the lead speaker on behalf of the Greens on the Commercial Tenancies (COVID-19 Response) Bill 2020. The first thing we have to look at is why this is a COVID-19 bill and why it is urgent. It is necessary because it provides some relief and assistance to businesses in order to minimise the financial impacts on tenants and landlords. At this time all of these tenants and landlords are looking for certainty. In fact, people are looking for certainty in many respects well outside the remit of this bill. Unfortunately, certainty is not available at this time. This bill might take us a step closer to it. It will have an effect in the emergency period from 30 March, when it was first announced by the federal government, until 29 September or another date as prescribed in the regulations.

Earlier in April, the national cabinet introduced an Australia-wide code of conduct to provide a framework for negotiations on commercial leases when the tenant is suffering financial distress as a result of the pandemic. In addition, this bill will provide some certainty to tenants and landlords through new agreements to be made between the two parties. In most situations there is an interdependency between tenants and landlords, and by this interdependency we mean that the landlord needs a tenant for the revenue they generate and the tenant needs premises. Providing a useful code of conduct to facilitate negotiations I hope will be of benefit, but, of course, we do not know what is going to be in the code of conduct. As I said, there is an interdependence, because this bill may appear to be one-sided towards tenants, but if a landlord has a tenant in financial distress, they are going to want some certainty about what happens when the tenant can no longer manage. Plus, because a landlord is dependent on having a tenant, they may want to try to assist the tenant to remain in business. If giving the tenant relief allows them to keep their doors open a bit longer, keep the wheels turning and keep revenue coming into the business, there is more chance of having an ongoing tenant when this period ends. The intention of the code of conduct to assist in making these agreements is a great idea. Of course, after that it will provide a framework for dispute resolutions as well.

During the period of 30 March to 29 September or another date as prescribed, the bill implements a number of restrictions on small commercial leases, and that includes a moratorium on evictions. This bill will also allow for regulations to prescribe a code of conduct. The code of conduct agreed to by the national cabinet seems to be the starting point. It is a set of good faith leasing principles for commercial tenancies between the landlords and tenants. This bill also provides a dispute resolution process for issues arising out of legislation or the code of conduct and related to the COVID-19 emergency period. That is an important point. It is for disputes related to the COVID-19 situation, so it is contained to that period.

The prohibitions listed in this bill apply to small commercial leases, and these are defined as a retail shop as defined in the Commercial Tenancy (Retail Shops) Agreements Act, leases where premises are used as a small business as defined in the Small Business Development Corporation Act and leases where the tenant is an incorporated association under the Associations Incorporations Act, taking into account all the not-for-profits that also pay rent and may be in distress at this point. I would like to mention that prohibited actions are actions applicable to a small commercial lease, but in some instances subclauses refer to a small commercial lease and in other cases those words are absent. In the briefing it was suggested that this is a drafting convention, but as I understand the briefing each of these prohibitions apply to small commercial leases. We have already heard about some of the prohibited actions during the emergency period. The eviction of the tenant for failure to pay rent or other sums owing is

prohibited, as it is for not being open during times specified in the lease or for other situations as may be prescribed. The prohibition on evictions is not applicable in just any situation; it is limited to certain areas. Also prohibited is the termination of the lease for small commercial tenancies, particularly if the grounds for actions are as required by law in response to the pandemic. Also prohibited are rent increases during the emergency period unless they are determined by the amount of turnover, which we heard about earlier in the upper house. That is an important point to make because it would be hard to believe that rent increases would be occurring at this time unless they were regular standard, set increases. Given the economic situation we are in and the economic uncertainty we are heading into, that seems very reasonable. Also, there are prohibitions that there can be no claim on any form of security during the emergency period for the performance of the tenant's obligations. After that point, it is another situation. There are prohibitions also on progressing proceedings for a breach that occurred after the COVID-19 restrictions but before this legislation comes into operation through the relevant period from 30 March to the date the bill receives royal assent. That does not stop proceedings that happened before 30 March that might have led to a breach. Also, there can be no penalties or restrictions on tenants who do not trade or reduce their trading hours. Having been a tenant in a shopping centre, I know how strict they can be, and it is very good to include that in the bill.

This bill allows a code of conduct to be adopted through regulations either with reference to the code in the regulations, in which case as the code changes, the changes would have no legal effect unless adopted by later regulations, or the code could be incorporated into the regulations. It is good to see that this legislation includes that the code must be published on a government website. The Greens are always asking for this sort of information to be made easily and publicly available so people can check it. I am really pleased to see that that is in the legislation. The code of conduct that was agreed by the national cabinet and released in early April provides a good starting point for the code that will be referred to in this legislation, but it is important to note that that code seems to have been hastily written. Had there been more time, I think the code would have been more refined, but that is the starting point. We hope that, through this legislation, the right words will be put into the code. I should mention that the objectives of the code as written by the national cabinet are —

to share, in a proportionate, measured manner, the financial risk and cashflow impact ... whilst seeking to appropriately balance the interests of tenants and landlords.

That is a good starting point but, again, it is asking people to act in good faith and be reasonable and respectful and try to work towards a solution. As I understand it, the code will apply to tenants suffering financial stress or hardship as a result of the COVID-19 pandemic and those tenants who are eligible for the commonwealth JobKeeper program if they have self-assessed they would lose 30 per cent or more of their revenue through this transition period, and it applies also to tenants who have annual turnover of up to \$50 million. We are talking about not only small businesses, but also medium-sized enterprises. That is an important distinction to make because the prohibitions that were put in place were specifically for small commercial tenancies but the code seems to extend it to those medium-sized enterprises with revenues of up to \$50 million. This is in the code currently. We have not had any confirmation that that is the government's intention, so I ask the minister to confirm whether these regulations will include medium-sized enterprises, because I understand that many eligibility criteria can be written into the code. It is important that we acknowledge who will be included in the legislation and what size organisation it will apply to and what the eligibility criteria will be. The principles in the code, as written, include guidance on negotiating temporary arrangements such as rent reductions and waivers, amortisation of rental deferrals, freezes on rent increases and the sharing of benefits. That last principle is an important one that we have heard about here and concerns whether landlords can access any other tax relief or benefits. In addition, the code requires landlords to pass on rebates or waive other costs that would normally be covered by the tenant through outgoings or other operating cost contributions. Of course, many commercial leases contain not only the lease amount, but also other outgoings that may not be fixed—that is, a variable cost for outgoings as per the landlord's direct costs related to that property.

Part 4, "Adopted code of conduct", enables that the regulations may adopt, either wholly or in part or with modifications, a code of conduct. In addition, the time frame for the production of the national code of conduct was short and it appears to be hastily written. It is unclear exactly which parts of that code are likely to be included or modified in these regulations. Clause 13 obviates the need for parliamentary debate and enables the adoption or modification of the national code without further scrutiny. From what I read earlier today, I understand that the government has said that it is willing to hear from non-government members of this house. I have noted during this debate that many of us are hearing from constituents and others who have very reasonable contributions. I think it would be very important for everyone to have input into this code of conduct if we want to ensure that certain issues are in it. They may not all get in, but I think that offer to hear from non-government members is an important point, and we should take up that offer whenever possible to make sure that when this code of conduct comes out, it is reasonable.

Hon Alannah MacTiernan; Hon Nick Goiran; Hon Rick Mazza; Hon Robin Scott; Hon Aaron Stonehouse; Hon Diane Evers; Hon Colin Holt

I also have concerns about whether the code will be binding on parties to leases. There was some mention about decisions being made by a dispute resolution body that the parties would be bound to. Will there be other parts that are binding? Through our processes, if it goes through the State Administrative Tribunal, will that be binding? It is an important point that I think we need to know about this code of conduct up front—during this debate. Is it just a suggestion of what people can do, or is it what people must do? Again, I ask the minister: is it expected that the national code of conduct will be referred to or incorporated into the regulations? If it will be incorporated or referred to, what parts are intended to be included, excluded or modified? I understand that it will take a month to be finalised, but I think that there are some general principles that we need to have in there. Many landlords and, possibly, many tenants will want to know how binding this will be. I understand that if they make an agreement, that will be fine and it will be binding like any other agreement. If they go to a tribunal, that can also provide a result. But in those other cases in which they do not take those final steps, is there something else that they will need to address, or will we just have considerable lawsuits at the end of it for non-payment of rent if no agreement is made?

Another point I would like to make is that this bill has a sunset clause—a period of 12 months that begins on the day after the day that the emergency period ends. I really appreciate having that in the bill because we assume that this will not be an ongoing situation and we will find a way to get back to some semblance of normality. The code, as it currently reads, states that it will be for only the period of the JobKeeper program, which at this point will end on 27 September. The national code states that it is for the COVID-19 pandemic plus a reasonable recovery period. It also talks about 24 months for repayments of rent in arrears. If it is for 12 months following the end of the emergency period, will that relate to the code of conduct and the reasonable recovery period? How will it relate if an agreement is made, or if it is assumed that the amount in arrears can be repaid over 24 months?

Part 5 of this legislation regards the resolution of disputes. The dispute resolution process is a mechanism for disputes in the operation of new legislation or a code of conduct. The legislation allows for an application to the State Administrative Tribunal to make a determination, and for a request to the Commissioner for Small Business to facilitate a dispute resolution. The SAT makes a determination, whereas the commissioner just facilitates a resolution. Ideally, the landlord and tenant would reach a mutually acceptable agreement, guided by the code of conduct. If a tenant is in distress in difficult times because of the COVID-19 situation, the tenant and the landlord should discuss the issue in good faith and work towards a solution that would allow the tenant to continue to operate so that they could remain a tenant and somehow trade their way out of it, while giving a good return to the landlord.

I had a few other questions during the briefing and I put those to the minister to clarify. I would like confirmation that clauses 15(3)(b) and 17(1)(b)—this is about the dispute resolutions—refer to a landlord under the lease that owns or operates as a small business and that this is included in the small business definition in the Small Business Development Act. I ask this to confirm that an individual with a property that is leased to a large business—the tenant is not the small business in this case, but the landlord is—has access to dispute resolutions through the Small Business Development Corporation and the commissioner, and determinations through the State Administrative Tribunal. Is that still allowed to that landlord as a small business? I would also like the minister to clarify whether the parties to leases that are not small commercial leases can apply to the tribunal to determine the dispute, and whether that will be included in the code of conduct.

I apologise for asking so many questions, but I think it is important because, as we have all said, we have had very little time to go through this, and a lot of areas are not clearly defined. The more that we can define through this period, the better the landlords and tenants can understand what is meant by the legislation.

Clause 16(4) states —

... the Tribunal must have regard to —

...

- (c) the principles of proportionality and fairness, and any other relevant principles, set out in the adopted code of conduct.

If this is the case in the code of conduct and a matter goes to the State Administrative Tribunal, can either party appeal if they do not feel that the principles of proportionality and fairness have been regarded? As I was saying before, although this is binding, the right to appeal is often important.

As I understand it, the prohibitions apply to small commercial leases as defined, and any dispute under this legislation must first go to the commissioner, unless both parties agree not to, in which case they can go straight to the tribunal. This is different from what I have read in the *Hansard* of the other house when the government responded that small businesses would have to go to the commissioner. But, as I read it, in the lease they can agree to not go through the commissioner and instead go directly to the State Administrative Tribunal. The national cabinet code has regulated that medium-sized enterprises—that is up to \$50 million or more—would go directly to the tribunal. Again, that is in the code, so I want to confirm that.

Hon Alannah MacTiernan; Hon Nick Goiran; Hon Rick Mazza; Hon Robin Scott; Hon Aaron Stonehouse; Hon Diane Evers; Hon Colin Holt

At that point, I will conclude my comments by saying that we are not all together with the timing of this bill. It has come through so quickly. I know that we are in an emergency period and that work has to be done very quickly and sometimes corrected afterwards. In order to give relief to commercial tenants and for them to respond to the impacts of COVID-19 by making suitable agreements, and in order to assist in their longevity and give businesses a chance of surviving through this period, for the benefit of both tenants and landlords, the Greens will allow this legislation to pass.

HON COLIN HOLT (South West) [4.10 pm]: I will be relatively quick. One of the reasons I feel completely underprepared to comment on the Commercial Tenancies (COVID-19 Response) Bill 2020 is the short amount of time that we have had to consider it. We have had a copy of the second reading speech, which outlines the policy of the bill, for less than an hour. When we were given a copy of the second reading speech and the explanatory memorandum, we were also given a copy of issue 2 of supplementary notice paper 186 relating to the bill.

I can understand the urgency and where we are at in responding to the current situation. When we make laws in this place, our responsibility is to make laws that are as good as possible for the people of Western Australia. It does not help when we are compromised by the situation we are in, which is regrettable. It was played out in the previous bill, when we had some time constraints. Not only were we not given enough time to cover the questions raised by opposition members in this place, but also there was not enough time for the government to debate and pass amendments to its own bill. It is not ideal. We are being asked to support a bill with little consideration at the direction of not only this government, but also the national cabinet.

Reading through the second reading speech, I see that the legislation focuses on giving relief to commercial tenants who are suffering as a consequence of the COVID-19 restrictions. I have complete sympathy for them. People are being put into situations that they would never have dreamed of because of this pandemic. The government has said that some businesses must close because of it. We would expect some economic pain as a result. We have to implement some strategies to help with that economic pain. As I read the legislation, it seems to be leaning towards the commercial tenancy side of the equation. I do not think the balance is quite right. We had this discussion during the debate on the Residential Tenancies (COVID-19 Response) Bill 2020. I think it also applies to this legislation.

What anyone would be looking for in this bill is a package of support that goes beyond just legislative change. That includes economic support for tenants who are suffering a great deal from forced closures, or unforced closures because of stay-at-home provisions, border closure provisions and social distancing provisions. It also has a knock-on effect for landlords and commercial landlords who are feeling the effect up the line from those specific closures. The state and federal governments now need to turn their mind to not only a legislative response like this, but also some sort of economic package response that gives people some relief.

I will not make much more of a contribution. We will look at some of the clauses and how they support the policy of the bill. I suspect that there will be quite a lot of discussion and potential amendments will be moved. I note that within the last hour, I received emails from organisations asking us to please vote against the bill. That sends signals to me that this is quite rushed. I understand the reasons for that. Consultation has been minimal. There are losers and winners in any situation. At the moment, everyone is losing because of COVID-19. This bill addresses only one part of that problem in a limited way. Somewhere along the line we need to provide a support package that addresses concerns and provides some relief and solace to those stakeholders who are calling on us to vote against the Commercial Tenancies (COVID-19 Response) Bill 2020. The Nationals WA will be supporting this bill during these unfortunate circumstances.

HON ALANNAH MacTIERNAN (North Metropolitan — Minister for Regional Development) [4.14 pm] — in reply: Again, I thank members for their support. I completely and utterly understand the very difficult situation in which they find themselves and that they have been given minimal time to deal with the complexity of the Commercial Tenancies (COVID-19 Response) Bill 2020. I completely understand those concerns. We would not be attempting to do this if we did not feel that we needed to move very quickly to provide some certainty for small commercial lessees. We understand that there is, in one sense, an added lack of concern because we are talking about a code of conduct that will be enshrined and have some of the protections of this legislation. I can assure members that a lot of negotiation needs to be undertaken to get to that code of conduct, but protections provided to small commercial lessees against eviction will happen immediately to give them some security to work their way through these issues. We accept that the code of conduct needs an enormous amount of work and negotiation on the many issues that have been raised by all members across the house. It will need to be done in a very detailed way. From the time lines I have been given, we are due to come back into this chamber on 12 May; is that correct, Deputy Leader of the House?

Hon Stephen Dawson: I think so.

Hon Alannah MacTiernan; Hon Nick Goiran; Hon Rick Mazza; Hon Robin Scott; Hon Aaron Stonehouse; Hon Diane Evers; Hon Colin Holt

Hon ALANNAH MacTIERNAN: On the time lines that we have been given, this is certainly not the case. I will be seeking from the Attorney General some commitment to ensure that before the regulations are tabled, members are given an opportunity to be consulted. I know that each member has been contacted by various stakeholder groups and that they would want to have some input. Members will not find that a code of conduct will be in place for three weeks before members come back to Parliament and can move a disallowance; that is not our intention. We understand the great complexity involved. We understand that other assistance packages need to be provided—landlords should not be the only ones to take responsibility. The federal government’s JobKeeper scheme is helping tenants and business operators to stay commercially viable, and that in turn will help the landlords. It is not as though the government is not giving any assistance in this space. Premier McGowan has indicated that he is looking at what other commercial assistance packages could be made available by government. We are not in a position to make any undertakings about that, but certainly that very big JobKeeper assistance package—more than \$1 billion—will help to maintain the viability of those tenants, which in turn will help to maintain the viability of the landholders. Hon Rick Mazza raised the issue of bank securities and asked how that would apply. It is certainly the case that security guarantees are in place to ensure that tenants who operate under a company are personally liable. This does not make those inoperable; it just says that they cannot be utilised, as I understand it, during that period to become the mechanism to force the tenant out of a premises. These are not final solutions. Hon Diane Evers and Hon Colin Holt acknowledge that this is about just slowing down the process, allowing a pause so that landlords and tenants, particularly tenants, have the ability to deal with their immediate problem. Hopefully, in a month or two a number of those businesses that were required to close will reopen and, indeed, by the end of six months we might see a substantial recovery. This is seen very much as a temporary mechanism.

Questions have been asked about the complexity of how the code will apply and to what will it apply. It is possible that the code may apply more broadly. An office tenant, for example, may fall within the code, although they do not necessarily fall under the current arrangements. There will be some issues for us to resolve. In the short term, this applies to commercial leases and it is intended to provide immediate protection to very small businesses. We may or may not draw the code as broadly as has been proposed in the national scheme, to apply to anyone who is eligible for the JobKeeper payment. That is something that will be very much subject to the negotiations that will take place over the next month with a range of stakeholders, including those who represent property owners.

Hon Diane Evers asked whether parties to the leases that are not small commercial leases will be able to apply to the tribunal. The bill provides for resolution of dispute by a tribunal. If the lease falls within the scope of the code, the parties will be able to apply to the tribunal for determination. She asked whether the tribunal would have regard to the proportionality and whether there were avenues to appeal decisions made by the tribunal. I am advised that in making an order in the proceedings under the bill, the tribunal will have regard to proportionality. The bill does not affect the ability of a party to seek leave to appeal on a question of law. Whether or not a decision of the tribunal gives rise to a question of law will depend on the individual circumstances. There is a capacity if there is an error of law, as is always the case.

It was also asked whether small business owners who are not lessees but indeed are lessors will have access to the tribunal. It is confirmed that a small business owner will have access to the advice and dispute resolution of the Small Business Commissioner.

The underlying principles of the national code and the idea of a proportional sharing of the losses and risks that have emerged will be reflected in the code, but there are many, many matters to be resolved. As I have said, I urge members to keep consulting with those groups and have input into the process of determining the code. There are not that many government amendments. The major amendment addresses the concern that was raised with me by many members yesterday that people who have no financial hardship will use this as a commercial lever to simply not pay rent for six months and gain a commercial advantage. The government amendments on the supplementary notice paper provide a very clear way of distinguishing those people and ensuring that a landlord has the ability to seek the termination of a lease if people are not paying rent when they have no commercial hardship.

Again, I realise that this has not been an entirely satisfactory process, but it is really important that we put these measures in place for small lease holders. It is really important to put in place the base level of prohibitions that will protect people from being evicted for the time being. We will have a bit more time and we anticipate it will take at least a month of negotiation and discussion before we develop the code. I appreciate members’ forbearance in being prepared to support this legislation, notwithstanding that they have had not had a great deal of time to absorb this matter.

Question put and passed.

Bill read a second time.

The PRESIDENT: Members, we would now normally move into committee, but I think we might start question time and move into committee after question time.

Extract from *Hansard*
[COUNCIL — Friday, 17 April 2020]
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Hon Alannah MacTiernan; Hon Nick Goiran; Hon Rick Mazza; Hon Robin Scott; Hon Aaron Stonehouse; Hon
Diane Evers; Hon Colin Holt
