

Commercial Tenancies (COVID-19 Response (Early Termination)) Bill 2020

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Defined terms

Western Australia

LEGISLATIVE ASSEMBLY

**Commercial Tenancies (COVID-19 Response
(Early Termination)) Bill 2020**

A Bill for

**An Act to respond to the impact of the COVID-19 pandemic by
providing for the termination of certain commercial leases, and for
related purposes.**

The Parliament of Western Australia enacts as follows:

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1 **1. Short title**

2 This is the *Commercial Tenancies (COVID-19 Response (Early*
3 *Termination)) Act 2020*.

4 **2. Commencement**

5 This Act comes into operation as follows —

- 6 (a) sections 1 and 2 — on the day on which this Act
7 receives the Royal Assent;
8 (b) the rest of the Act — on the day after that day.

9 **3. Terms used**

10 (1) In this Act —

11 *business day* means a day that is not a Saturday, Sunday or
12 public holiday throughout the State;

13 *commercial lease* means —

- 14 (a) a small commercial lease; or
15 (b) any other lease that is of a class prescribed by
16 regulations;

17 *Commissioner* means the Commissioner designated under the
18 *Fair Trading Act 2010* section 55;

19 *COVID-19 consequences* means any of the following —

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

25 *severe financial distress* has the meaning given in section 8;

26 *Tribunal* means the State Administrative Tribunal.

27 (2) Where terms defined in the *Commercial Tenancies (COVID-19*
28 *Response) Act 2020* section 3 are used in this Act they have the
29 same meaning in this Act as they have in that Act.

1 **4. Act binds Crown**

2 This Act binds the Crown in right of Western Australia and, so
3 far as the legislative power of the Parliament permits, the Crown
4 in all its other capacities.

5 **5. Application**

6 This Act has effect despite anything to the contrary in any
7 written law.

8 **6. Leases, contracts and agreements taken to be modified**

9 The provisions of any lease or any other contract or agreement
10 are taken to be modified to the extent necessary to give effect to
11 the operation of this Act.

12 **7. No contracting out**

13 (1) A lease or any other contract or agreement is of no effect to the
14 extent that it purports to exclude or restrict the operation of this
15 Act.

16 (2) A purported waiver of a right, remedy or benefit conferred on a
17 person under this Act is of no effect.

18 **8. Term used: severe financial distress**

19 For the purposes of this Act, a tenant under a commercial lease
20 is in *severe financial distress* if —

- 21 (a) the tenant is suffering financial hardship as a result of
22 COVID-19 consequences; and
- 23 (b) the tenant has made reasonable endeavours to negotiate
24 waivers or deferrals of rent, or other concessions, from
25 the landlord; and
- 26 (c) despite those reasonable endeavours and any waiver or
27 deferral of rent, or other concessions, made by the
28 landlord, it is reasonable to conclude that, because of the
29 tenant's financial hardship, the tenant is not, or will not

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- 1 at some later time, be in a position to perform the
2 tenant's obligations under the commercial lease; and
3 (d) any other requirements that are prescribed by
4 regulations are met.

5 **9. Termination of commercial leases if tenant in severe**
6 **financial distress**

- 7 (1) A tenant under a commercial lease who claims to be in severe
8 financial distress may, at any time during the emergency period,
9 give the landlord a notice in writing proposing the termination
10 of the commercial lease under this Act.
- 11 (2) Within 14 days after the day on which the tenant's notice is
12 given, the landlord may give a notice in writing to the tenant —
13 (a) agreeing to the termination of the commercial lease; or
14 (b) stating that the landlord intends to make an application
15 to the Tribunal to determine whether the commercial
16 lease is to be terminated under this Act.
- 17 (3) A notice under subsection (1) or (2) must be in a form approved
18 by the Commissioner.
- 19 (4) Subsection (5) applies if the landlord —
20 (a) agrees under subsection (2)(a) to the termination of the
21 commercial lease; or
22 (b) does not give a notice under subsection (2) within the
23 14 day period referred to in that subsection.
- 24 (5) The commercial lease terminates at the end of the period of
25 21 days after the day on which the tenant's notice was given
26 under subsection (1).

27 **10. Applications to Tribunal**

- 28 (1) If the landlord gives a notice under section 9(2)(b), the landlord
29 must, within 7 days after the day on which the notice was given,
30 make an application to the Tribunal to determine whether the
31 commercial lease is to be terminated under this Act.

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- 1 (2) In determining the application, the Tribunal must consider
2 whether the tenant is in severe financial distress.
- 3 (3) If the Tribunal is satisfied that the tenant is in severe financial
4 distress at the time it determines the application —
- 5 (a) the Tribunal must make an order declaring that the
6 commercial lease is to be terminated, including when
7 the termination is to take effect; and
- 8 (b) the commercial lease terminates in accordance with the
9 order.
- 10 (4) If the Tribunal is not satisfied that the tenant is in severe
11 financial distress at the time it determines the application —
- 12 (a) the Tribunal must make an order stating that it is not
13 satisfied; and
- 14 (b) if, despite not being satisfied, the Tribunal considers it
15 appropriate to do so, the Tribunal may make —
- 16 (i) an order for the waiver or deferral of rent, or
17 some other concession by the landlord to the
18 tenant, in relation to the commercial lease; and
- 19 (ii) any ancillary order that it considers necessary for
20 the purpose of enabling an order under
21 subparagraph (i) to have full effect.
- 22 (5) If the landlord does not make an application to the Tribunal
23 within the 7 day period referred to in subsection (1), the
24 commercial lease terminates at the end of the period of 7 days
25 after the 7 day period referred to in subsection (1).

26 **11. Effect of termination of commercial leases under this Act**

- 27 (1) This section applies if a commercial lease terminates under
28 section 9(5) or 10(5) or terminates in accordance with an order
29 made by the Tribunal under section 10(3).
- 30 (2) Except as set out in this section, the landlord and tenant are
31 released from any liability, and have no further liability, to each
32 other under, or arising out of, the commercial lease.

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- 1 (3) The tenant is liable to pay the landlord any rent, or other monies
2 owing by the tenant, under the commercial lease that were
3 required to be paid before the commencement of the emergency
4 period, or that are in respect of a period before the
5 commencement of the emergency period.
- 6 (4) Subsection (5) applies if the tenant does not leave the land or
7 premises that are the subject of the commercial lease —
8 (a) in the state in which the tenant would have been
9 required to leave them had the commercial lease
10 continued for the rest of its term; or
11 (b) otherwise in a state of reasonable cleanliness and repair.
- 12 (5) The tenant is liable to pay the landlord the landlord’s reasonable
13 costs of putting the land or premises into the state referred to in
14 subsection (4)(a) or (b), except, in the case of subsection (4)(b),
15 to the extent that those costs relate to something that the
16 landlord was required to do, or that the tenant was not otherwise
17 responsible for, under the commercial lease.
- 18 (6) The landlord may recover monies the tenant is liable to pay
19 under subsection (3) or (5) from any security (including money,
20 a bank guarantee or other bond) that was provided for the
21 performance of the tenant’s obligations under the commercial
22 lease, but otherwise the landlord must return or release any such
23 security.

24 **12. Notices under this Act**

- 25 A notice under this Act is given to a landlord or tenant by —
26 (a) delivering it personally to the person; or
27 (b) sending it by prepaid post addressed to the person to —
28 (i) the person’s usual or last known place of
29 residence or business; or
30 (ii) an address that the person has given for service,
31 or for the giving of notices, under the
32 commercial lease; or

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- 1 (c) leaving it at an address referred to in paragraph (b)(i) or
2 (ii); or
- 3 (d) emailing it to an email address that the person has given
4 for service, or for the giving of notices, under the
5 commercial lease; or
- 6 (e) in the case of a corporation or of an association of
7 persons (whether incorporated or not) — delivering or
8 leaving the notice or posting it as a letter, addressed in
9 each case to the corporation or association, at its
10 principal place of business or principal office in the
11 State.

12 **13. Time when notices taken to be given**

- 13 (1) In the absence of proof to the contrary, a notice that is emailed
14 to a person in accordance with section 12(d) or delivered to, or
15 left for, a person in accordance with section 12(e) is taken to be
16 given —
- 17 (a) on the business day on which the notice was emailed,
18 delivered or left; or
- 19 (b) if the notice was emailed, delivered or left on a day that
20 was not a business day, the next business day after that
21 day.
- 22 (2) In the absence of proof to the contrary, a notice that is sent by
23 prepaid post —
- 24 (a) to an address within Australia — is taken to be given on
25 the 3rd business day after the day on which the notice
26 was posted; or
- 27 (b) to an address outside Australia — is taken to be given
28 on the 11th business day after the day on which the
29 notice was posted.

30 **14. Regulations**

- 31 The Governor may make regulations prescribing matters —
32 (a) required or permitted by this Act to be prescribed; or

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1 (b) necessary or convenient to be prescribed for giving
2 effect to this Act.

3 **15. Repeal**

4 This Act is repealed at the end of the period of 12 months that
5 begins on the day after the day on which the emergency period
6 ends.

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Defined terms

[This is a list of terms defined and the provisions where they are defined.

The list is not part of the law.]

| Defined term | Provision(s) |
|---------------------------------|---------------------|
| business day | 3(1) |
| commercial lease..... | 3(1) |
| Commissioner | 3(1) |
| COVID-19 consequences..... | 3(1) |
| severe financial distress | 3(1), 8 |
| Tribunal..... | 3(1) |