



Government of **Western Australia**  
Department of **Mines, Industry Regulation and Safety**

# **EXPLANATORY MEMORANDUM**

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

**EXPLANATORY MEMORANDUM**  
**COMMERCIAL TENANCIES (COVID-19 RESPONSE (EARLY TERMINATION))**  
**BILL 2020**

**Overview of the Bill**

The purpose of this Bill is to confer a right on tenants in severe financial distress caused by the COVID-19 pandemic to terminate certain commercial leases.

If a tenant terminates on this ground the tenant will not be required to pay the usual compensation or damages to the landlord associated with early termination of a lease (often referred to as 'break lease costs').

**Clause 1 Short title**

The short title of the Act is the *Commercial Tenancies (COVID-19 Response (Early Termination)) Act 2020*.

**Clause 2 Commencement**

Provides that sections 1 and 2 of the Act is to come into operation on Royal Assent.

Sections 3 to 15 of the Act come into effect on the day after Royal Assent.

**Clause 3 Terms used**

*business day* – means a day that is not a Saturday, Sunday or public holiday throughout the State.

*commencement day* – means the day after the day on which this Act receives the Royal Assent.

*commercial lease* – means a small commercial lease as defined in section 3 of the *Commercial Tenancies (COVID-19 Response) Act 2020* or any other lease that is prescribed.

*Commissioner* means the Commissioner designated under the *Fair Trading Act 2010* section 55.

*COVID-19 consequences* – means:

- a restriction imposed under a written law in response to the COVID-19 pandemic;
- changes in societal behaviour in response to the COVID-19 pandemic; and
- any other consequences of the COVID-19 pandemic.

*severe financial distress* has the meaning given in section 8.

*Tribunal* – means the State Administrative Tribunal.

Also provides that unless the contrary appears, where terms defined in the *Commercial Tenancies (COVID-19 Response) Act 2020* are used in this Act they have the same meaning in this Act as they have in that Act.

**Clause 4 Act binds the Crown**

Provides that the Act binds the Crown.

**Clause 5 Application**

Provides that the Act has effect despite anything to the contrary in any written law.

**Clause 6 Leases, contracts and agreements taken to be modified**

Provides that any lease or any other contract or agreement is taken to be modified to give effect to the Act. .

**Clause 7 No contracting out**

Provides that a lease or any other contract or agreement, has no effect if it restricts the operation of the Act. Any attempt to waive a right, remedy or benefit provided to a person under the Act has no effect.

**Clause 8 Term used: severe financial distress**

Provides that a tenant under a commercial lease is in *severe financial distress* if the tenant:

- is suffering financial hardship as a result of COVID-19 consequences; and
- has made reasonable endeavours to negotiate waivers or deferrals of rent, or other concessions, from the landlord; and
- despite those reasonable endeavours and any waiver or deferral of rent, or other concessions, made by the landlord, it is reasonable to conclude that, because of the tenant's financial hardship, the tenant is not, or will not at some later time be, in a position to perform the tenant's obligations under the commercial lease; and
- meets other prescribed criteria.

## **Clause 9 Termination of commercial leases if tenant is in severe financial distress**

Provides that a tenant under a commercial leases who claims to be in severe financial distress may, at any time during the emergency period, give the landlord a notice in writing proposing termination of the commercial lease under the Act.

Within 14 days of the tenant's notice being given, the landlord may give notice in writing to the tenant either agreeing to the termination of the commercial lease or stating that they intend to make an application to the Tribunal to determine whether the commercial lease is to be terminated under the Act.

The notices provided by the tenant or landlord must be in a form approved by the Commissioner.

The commercial lease terminates (21 days after the date of the tenant's notice) if the landlord:

- agrees to the termination of the commercial lease in accordance with the approved form; or
- does not give a notice in the approved form within the 14 day period.

## **Clause 10 Applications to the Tribunal**

Provides that, if the landlord has given notice under section 9 that the landlord intends to make an application to the Tribunal, within 7 days of giving the notice the landlord must make an application to the Tribunal to determine whether the commercial lease is to be terminated under this Act.

In determining the application the Tribunal must consider whether the tenant is in severe financial distress.

If the Tribunal is satisfied that the tenant is in severe financial distress:

- the Tribunal must make an order declaring that the lease is terminated, including when the termination is to take effect; and
- the commercial lease terminates in accordance with the order.

If the Tribunal is not satisfied that the tenant is in severe financial distress the Tribunal:

- must make an order stating it is not satisfied; and
- may make an order for waiver or deferral or rent or some other concession by the landlord to the tenant and any ancillary order it considers necessary.

If the landlord does not make an application to the Tribunal within the required 7 day period, the commercial lease terminates.

## **Clause 11 Effect of early termination of commercial leases under this Act**

Provides that this section applies if a commercial lease terminates under section 9 or terminates in accordance with an order made by the Tribunal under section 10.

Provides except as set out in this section, the landlord and tenant are released from any liability, and have no further liability, to each other under, or arising out of, the commercial lease.

Provides that the tenant must pay the landlord any rent or other monies owing under the commercial lease required before the commencement of the emergency period, or that are in respect of a period before the commencement of the emergency period.

The tenant must leave the premises —

- in the state in which the tenant would have been required to leave them had the commercial lease continued for the rest of its term; or
- otherwise in a state of reasonable cleanliness and repair.

A landlord can recover from the tenant any costs the landlord incurs putting the premises into the state of cleanliness and repair referred to above. This does not include any costs relating to the landlord's obligations under the lease (for example, major repairs).

Provides that the landlord may recover monies the tenant is liable to pay under this section from any security provided by the tenant in accordance with the commercial lease, but otherwise the landlord must return the security to the tenant.

## **Clause 12 Notices under this Act**

Provides how a notice under the Act may be given to a person either by:

- delivering it personally to the person;
- sending it by prepaid post to the person at their usual or last known place of residence or an address that the person has given for service under a commercial lease agreement; or
- leaving it at the person's usual or last known address or an address that the person has given for service under a commercial lease agreement;
- sending it to the person's email address that they gave for service under a commercial lease agreement; or
- delivering or leaving the document or posting it to the principal place of business or registered office in the State of the corporation or association.

### **Clause 13 Time when notices taken to be given**

Provides the time when notices are taken to be given.

If emailed delivered or left the notice to taken to be given:

- on the business on which the notice was emailed, delivered or addressed; or
- if the notice was emailed, delivered or left on a day that was not a business day, the next business day after that day.

Also provides that, in the absence of proof to the contrary, a document that is sent by prepaid post:

- to an address within Australia - is taken to be given on the 3rd business day after the day on which the notice was posted; and
- to an address outside Australia — is taken to be given on the 11th business day after the day on which the notice was posted.

### **Clause 14 Regulations**

Provides that the Governor may make regulations prescribing matters —

- required or permitted by this Act to be prescribed; or
- necessary or convenient to be prescribed for giving effect to this Act.

### **Clause 15 Repeal**

This Act is repealed at the end of the period of 12 months following the end of the emergency period.