

Commercial Tenancies (COVID-19 Response) Bill 2020

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Defined terms

Western Australia

LEGISLATIVE ASSEMBLY

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

A Bill for

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

The Parliament of Western Australia enacts as follows:

1

Part 1 — Preliminary

2

1. Short title

3

This is the *Commercial Tenancies (COVID-19 Response) Act 2020*.

4

5

2. Commencement

6

This Act comes into operation as follows —

7

(a) Part 1 comes into operation on the day on which this Act receives the Royal Assent (*assent day*);

8

9

(b) Parts 2 and 3 are deemed to have come into operation on 30 March 2020;

10

11

(c) the rest of the Act comes into operation on the day after assent day.

12

Part 2 — Terms used and application

3. Terms used

In this Act —

adopted code of conduct means a code of conduct adopted by regulations made under section 13;

emergency period means the period —

- (a) beginning on 30 March 2020; and
- (b) ending on —
 - (i) a day prescribed by regulations for the purposes of this paragraph; or
 - (ii) if a day has not been prescribed for the purposes of this paragraph before 29 September 2020 — 29 September 2020;

land includes any part of land;

landlord —

- (a) means the person who, under a lease, grants the tenant the right to occupy the land or premises that are the subject of the lease; and
- (b) includes a personal representative, successor or assignee of a landlord;

lease —

- (a) means any lease, sub-lease, licence or other agreement under which a person grants a right to another person to occupy land or premises —
 - (i) whether or not the right is a right of exclusive occupation; and
 - (ii) whether the lease, sub-lease, licence or agreement is made orally or in writing;

but

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- 1 (b) does not include any of the following —
- 2 (i) a long-stay agreement to which the *Residential*
- 3 *Parks (Long-stay Tenants) Act 2006* applies;
- 4 (ii) a residential tenancy agreement to which the
- 5 *Residential Tenancies Act 1987* applies;
- 6 (iii) a pastoral lease as defined in the *Land*
- 7 *Administration Act 1997* section 3;
- 8 (iv) a mining tenement as defined in the *Mining*
- 9 *Act 1978* section 8;
- 10 (v) any other lease, sub-lease, licence or other
- 11 agreement that is of a class prescribed by
- 12 regulations for the purposes of this paragraph;
- 13 ***operating expenses*** has the meaning given in the *Commercial*
- 14 *Tenancy (Retail Shops) Agreements Act 1985* section 12(3);
- 15 ***premises*** includes any part of premises;
- 16 ***rent*** includes any money, goods, services or other valuable
- 17 consideration in the nature of rent to be paid or supplied under a
- 18 lease by the tenant;
- 19 ***small business*** has the meaning given in the *Small Business*
- 20 *Development Corporation Act 1983* section 3(1);
- 21 ***small commercial lease*** means —
- 22 (a) a retail shop lease as defined in the *Commercial*
- 23 *Tenancy (Retail Shops) Agreements Act 1985*
- 24 section 3(1); or
- 25 (b) a lease where the tenant owns or operates a small
- 26 business and uses the land or premises that are the
- 27 subject of the lease for the purpose of carrying on that
- 28 business; or
- 29 (c) a lease where the tenant is an incorporated association as
- 30 defined in the *Associations Incorporation Act 2015*
- 31 section 3; or
- 32 (d) any other lease that is of a class prescribed by
- 33 regulations for the purposes of this paragraph;

1 *tenant* means the person who, under a lease, is entitled to
2 occupy the land or premises that are the subject of the lease.

3 **4. Act binds Crown**

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

7 **5. Application**

8 This Act has effect despite anything to the contrary in any
9 written law.

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

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

14 **7. No contracting out**

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

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

1 **Part 3 — Prohibited actions in respect of small**
2 **commercial leases and related matters**

3 **8. Term used: prohibited action**

4 In this Part —

5 ***prohibited action*** means action under, or in respect of, a small
6 commercial lease (including seeking orders, or commencing
7 proceedings, in a court or tribunal) for any of the following —

- 8 (a) eviction of the tenant from the land or premises that are
9 the subject of the small commercial lease;
- 10 (b) exercising a right of re-entry to the land or premises that
11 are the subject of the small commercial lease;
- 12 (c) possession;
- 13 (d) recovery of land;
- 14 (e) distraint of goods;
- 15 (f) forfeiture;
- 16 (g) termination of the small commercial lease;
- 17 (h) damages;
- 18 (i) requiring a payment of interest on unpaid rent or on any
19 other unpaid amount of money payable by the tenant to
20 the landlord under the small commercial lease
21 (including, without limitation, operating expenses);
- 22 (j) recovery of the whole or part of any security for the
23 performance of the tenant's obligations under the small
24 commercial lease (including, without limitation, a
25 security bond);
- 26 (k) performance of obligations by the tenant or any other
27 person under a guarantee given in respect of the small
28 commercial lease (including, without limitation, making
29 a demand on a bank guarantee);
- 30 (l) any other remedy otherwise available to the landlord
31 against the tenant at common law or under a written law.

1 **9. Prohibited action cannot be taken during emergency period**

2 Except in the circumstances (if any) prescribed by regulations
3 for the purposes of this section, a landlord cannot take
4 prohibited action during the emergency period on the grounds of
5 a breach by the tenant of a small commercial lease that occurs
6 during the emergency period if the breach consists of —

- 7 (a) a failure to pay rent or any other amount of money
8 payable by the tenant to the landlord under the small
9 commercial lease (including, without limitation, a
10 requirement under the lease to pay all or any of the
11 landlord's operating expenses); or
12 (b) the land or premises that are the subject of the small
13 commercial lease, or the business carried on there, not
14 being open for business at hours or times specified in the
15 small commercial lease; or
16 (c) any act or omission of a kind prescribed by regulations
17 for the purposes of this paragraph.

18 **10. Acts and omissions of tenants required under law in**
19 **response to COVID-19 pandemic**

20 An act or omission of a tenant during the emergency period that
21 is required under a written law in response to the COVID-19
22 pandemic is not to be regarded as —

- 23 (a) a breach of a small commercial lease; or
24 (b) grounds for termination of a small commercial lease; or
25 (c) grounds for the taking of any prohibited action under, or
26 in respect of, a small commercial lease.

27 **11. Rent increases prohibited during emergency period**

28 Rent payable under a small commercial lease (other than rent or
29 a component of rent determined by reference to turnover)
30 cannot be increased during the emergency period.

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- 1 **12. Prohibited actions taken, and other things occurring, during**
2 **relevant period**
- 3 (1) In this section —
4 ***relevant period*** means the period —
5 (a) beginning on 30 March 2020; and
6 (b) ending on the day on which this Act receives the Royal
7 Assent.
- 8 (2) This section applies if, during the relevant period —
9 (a) a landlord has taken or commenced prohibited action
10 (including a prohibited action that has a periodic or
11 ongoing effect); or
12 (b) a landlord has taken or commenced the performance of
13 any other measure (including a measure that has a
14 periodic or ongoing effect) that the landlord would not
15 have been able to undertake or commence during the
16 emergency period by virtue of the operation of this Part;
17 or
18 (c) the operation of the terms of a small commercial lease
19 has had effect, or has a periodic or ongoing effect,
20 contrary to the operation of this Part; or
21 (d) without limiting paragraphs (a) to (c), rent payable
22 under a small commercial lease has been increased
23 contrary to the operation of this Part.
- 24 (3) The prohibited action or other measure is as valid and effective
25 as it would have been had this Part not come into operation but,
26 so far as the prohibited action or other measure remains
27 incomplete or ongoing, or has a periodic or ongoing effect, it is
28 taken to be stayed or suspended until the end of the emergency
29 period.

- 1 (4) The effect of the operation of the terms of the small commercial
2 lease is as valid and effective as it would have been had this Part
3 not come into operation but, so far as the effect of the operation
4 of those terms remains incomplete or ongoing, or has a periodic
5 or ongoing effect, it is taken to be stayed or suspended until the
6 end of the emergency period.
- 7 (5) The increase in rent is as valid and effective as it would have
8 been had this Part not come into operation but the increase is
9 taken to be stayed or suspended until the end of the emergency
10 period.

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Part 4 — Adopted code of conduct

13. Regulations may adopt code of conduct

- (1) In this section —
code of conduct means a code of conduct relating to commercial leasing principles during the COVID-19 pandemic;
specified means specified in regulations.
- (2) Regulations may adopt, either wholly or in part or with modifications, a code of conduct.
- (3) The adoption may be by —
 - (a) incorporating the code of conduct in the regulations; or
 - (b) incorporating the code of conduct by reference.
- (4) If regulations adopt a code of conduct by reference, then, unless the regulations specify that a particular text is adopted —
 - (a) the code of conduct is adopted as existing when the regulations are made; and
 - (b) any amendments made to the code of conduct after the regulations are made have no legal effect as part of the regulations unless they are specifically adopted by later regulations or a later amendment to the regulations.
- (5) If regulations adopt a code of conduct by reference, the Minister must ensure that a copy of the code of conduct, including any amendments made to it from time to time that have been adopted, is published on a website maintained by or on behalf of the department of the Public Service principally assisting in the administration of this Act.
- (6) Regulations may provide for —
 - (a) an adopted code of conduct to apply to a person who is of a specified class or a lease that is of a specified class; and

- 1 (b) a person who is of a specified class to comply with an
2 adopted code of conduct; and
3 (c) an adopted code of conduct to be complied with in a
4 specified manner.

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Part 5 — Resolution of disputes

14. Terms used

In this Part —

code of conduct dispute means a dispute that arises out of, or in relation to, the application of the adopted code of conduct in relation to a lease (including, without limitation, a dispute about the waiver or deferral of rent payable under a lease);

Commissioner has the meaning given in the *Small Business Development Corporation Act 1983* section 3(1);

dispute —

- (a) means a dispute between the parties to a lease, or 1 or more parties to a lease and a person who has given a guarantee in respect of the lease, that arises out of, or in relation to, the operation of this Act; and

- (b) includes a code of conduct dispute;

party, in relation to a lease, means the landlord or the tenant under the lease;

Tribunal means the State Administrative Tribunal.

15. Applications to Tribunal

- (1) A party to a dispute may apply to the Tribunal to have the dispute determined by the Tribunal.

- (2) The application must be made during the emergency period unless the Commissioner has issued a certificate under section 18 in respect of the dispute.

- (3) Subsection (4) applies if the lease to which the dispute relates —

- (a) is a small commercial lease; or
- (b) the landlord under the lease owns or operates a small business and the lease is granted in the course of that business.

- 1 (4) An application in respect of the dispute cannot be made to the
2 Tribunal under subsection (1) unless —
- 3 (a) none of the parties to the dispute has made a request to
4 the Commissioner under section 17 in respect of the
5 dispute and the parties agree that the application can be
6 made; or
- 7 (b) the Commissioner has issued a certificate under
8 section 18 in respect of the dispute.
- 9 (5) Subsection (4) does not apply to a dispute that is of a class
10 prescribed by regulations for the purposes of this subsection.
- 11 (6) A copy of an application under subsection (1) that is required to
12 be given under the *State Administrative Tribunal Act 2004*
13 section 45(1) must be given in the manner and time (if any)
14 prescribed by regulations for the purposes of this subsection.
- 15 (7) Nothing in this section prevents a person making a request to
16 the Commissioner under section 17.

17 **16. Tribunal's powers to make orders**

- 18 (1) In this section —
19 *specified*, in relation to an order, means specified in the order.
- 20 (2) Without limiting any power to make an order that is conferred
21 by the *State Administrative Tribunal Act 2004*, in proceedings
22 under this Act the Tribunal may make any order that it considers
23 appropriate to resolve the dispute or proceedings.
- 24 (3) Without limitation, the orders that can be made by the Tribunal
25 include the following —
- 26 (a) an order that requires a party to the proceedings to pay
27 money to a specified person;
- 28 (b) an order for a party to the proceedings to do, or refrain
29 from doing, any specified thing;

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- 1 (c) if the proceedings relate to a code of conduct dispute —
2 any order that the Tribunal considers appropriate to give
3 effect to the approved code of conduct including,
4 without limitation, 1 or both of the following —
- 5 (i) an order that a specified amount of rent payable
6 under the lease to which the dispute relates be
7 waived for a specified period;
- 8 (ii) an order that a specified amount of rent payable
9 under the lease to which the dispute relates be
10 deferred and paid in a specified timeframe;
- 11 (d) an order dismissing the proceedings;
- 12 (e) any ancillary order that the Tribunal considers necessary
13 for the purpose of enabling an order under this section to
14 have full effect.
- 15 (4) In making an order in proceedings under this Act relating to a
16 code of conduct dispute, the Tribunal must have regard to —
- 17 (a) the financial impact of the COVID-19 pandemic on the
18 tenant's business and capacity to meet the tenant's
19 obligations under the lease; and
- 20 (b) if relevant in accordance with the adopted code of
21 conduct — the landlord's financial capacity; and
- 22 (c) the principles of proportionality and fairness, and any
23 other relevant principles, set out in the adopted code of
24 conduct.
- 25 (5) In making an order in any proceedings under this Act, including
26 an order under the *State Administrative Tribunal Act 2004*
27 section 87(2), the Tribunal may have regard to a certificate
28 issued under section 18 that relates to the proceedings.
- 29 (6) An order of the Tribunal requiring any thing to be done or
30 discontinued may fix the time within which that thing is to be
31 done or discontinued, as the case may be.

1 (7) In proceedings under this Act, the Tribunal may allow any
 2 equitable claim or defence, and give any equitable remedy, that
 3 the Supreme Court may allow or give.

4 **17. Requests for resolution of disputes using *Small Business***
 5 ***Development Corporation Act 1983 s. 15C or 15E***

6 (1) This section applies to a dispute if —
 7 (a) the lease to which the dispute relates is a small
 8 commercial lease; or
 9 (b) the landlord under the lease to which the dispute relates
 10 owns or operates a small business and the lease is
 11 granted in the course of that business.

12 (2) A party to the dispute may, under this Act, request the
 13 Commissioner to —

14 (a) provide assistance to attempt to resolve the dispute
 15 under the *Small Business Development Corporation*
 16 *Act 1983* section 15C; or
 17 (b) undertake alternative dispute resolution in respect of the
 18 dispute under the *Small Business Development*
 19 *Corporation Act 1983* section 15E.

20 (3) The request must be made during the emergency period.

21 (4) It is a function of the Commissioner to provide assistance to
 22 attempt to resolve disputes to which this section applies.

23 **18. Commissioner to issue certificate if dispute not resolved**

24 (1) If a request is made to the Commissioner under section 17 in
 25 relation to a dispute, the Commissioner must, on the request of a
 26 party to the dispute, issue a certificate to that person if the
 27 Commissioner is satisfied that —

28 (a) the dispute is unlikely to be resolved with the assistance
 29 of alternative dispute resolution; or

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- 1 (b) it would not be reasonable in the circumstances to
2 commence an alternative dispute resolution proceeding
3 in respect of the dispute; or
4 (c) alternative dispute resolution has failed to resolve the
5 dispute.

6 (2) The certificate is to be in a form approved by the Commissioner
7 and may include any information about the conduct of the
8 parties to the dispute that the Commissioner considers
9 appropriate in the circumstances.

10 **19. Commissioner may intervene in Tribunal proceedings**

11 The Commissioner may, at any time, intervene in proceedings
12 of the Tribunal in relation to a dispute to which section 17
13 applies.

14 **20. Relationship of this Part to *State Administrative Tribunal***
15 ***Act 2004***

16 Nothing in this Part prevents a dispute from being dealt with
17 through a compulsory conference or mediation process under
18 the *State Administrative Tribunal Act 2004*.

1 **Part 6 — Miscellaneous**

2 **21. Regulations**

3 The Governor may make regulations prescribing matters —

- 4 (a) required or permitted by this Act to be prescribed; or
5 (b) necessary or convenient to be prescribed for giving
6 effect to this Act.

7 **22. Regulations may provide Act does not apply, or applies as**
8 **modified, in certain circumstances or cases**

- 9 (1) The Governor may, on the recommendation of the Minister,
10 make regulations providing that a provision of this Act specified
11 in the regulations does not apply, or applies in a modified
12 manner specified in the regulations, to circumstances or cases
13 specified in the regulations.
- 14 (2) The Minister cannot make a recommendation for the purposes
15 of subsection (1) unless satisfied that the provision is no longer
16 required or should apply in a modified manner, as is relevant, in
17 order to respond to the COVID-19 pandemic.

18 **23. Transitional regulations**

- 19 (1) In this section —

20 *transitional matter* —

- 21 (a) means a matter of a transitional nature that arises as a
22 result of the enactment of this Act, including the making
23 of any regulations under this Act; and
24 (b) includes a saving or application matter.

- 25 (2) Regulations may prescribe all matters that are required or
26 necessary or convenient to be prescribed for dealing with a
27 transitional matter.

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1 **24. Repeal**

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

5



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)
adopted code of conduct	3
assent day	2
code of conduct	13(1)
code of conduct dispute	14(1)
Commissioner	14(1)
dispute	14(1)
emergency period	3
land	3
landlord	3
lease	3
operating expenses	3
premises	3
prohibited action	8
relevant period	12(1)
rent	3
small business	3
small commercial lease	3
specified	13(1), 16(1)
tenant	3
transitional matter	23(1)
Tribunal	14(1)