



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

EXPLANATORY MEMORANDUM

Commercial Tenancies (COVID-19 Response) Bill 2020

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COMMERCIAL TENANCIES (COVID-19 RESPONSE) BILL 2020

Overview of the Bill

The purpose of this Bill is to introduce a range of measures to provide for urgent relief for commercial tenants in response to the COVID-19 pandemic.

The Bill provides for the following in relation to small commercial leases:

- 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 (e.g. bank guarantee or security deposit) for the performance of the tenant's obligations under the lease;
- 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.

In addition, the Bill provides for:

- the adoption of a code of conduct for landlords and tenants under certain commercial leases; and
- a dispute resolution mechanism for disputes arising out of, or in relation to, the operation of the new legislation or the code of conduct

The Bill provides that the new measures will be in place for the period prescribed by regulations or if no period is prescribed, for a period of six months.

Part 1 - Preliminary

Clause 1 Short title

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

Clause 2 Commencement

Provides that Part 1 of the Act is to come into operation on Royal Assent. Parts 2 and 3 are deemed to come into operation on 30 March 2020. The rest of the Act comes into effect on the day after Royal Assent.

Part 2 – Terms used and application

Clause 3 Terms used

Provides the meaning for the following key terms used in the Act.

adopted code of conduct – means the code of conduct for landlords and tenants dealing with the impacts of the COVID-19 adopted by regulations under section 13 of this Act.

emergency period – means the period beginning on 30 March 2020 and ending on a day to be prescribed by regulation. If a day is not prescribed the last day of the emergency period is to be before 29 September 2020.

land – includes any part of land.

landlord – means the person under a lease who grants the tenant the right to occupy the premises and includes the landlord's personal representative, successor or assignee.

lease – broadly means any lease, sub-lease, licence or other agreement that grants another person a right to occupy premises. The term includes an oral agreement and applies whether or not a right to exclusive occupation has been granted. The term excludes residential, mining and pastoral leases and any other lease excluded by regulation.

operating expenses has the meaning given in the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

premises – includes any part of premises.

rent – includes any money, goods, services or other valuable consideration in the nature of rent to be paid or supplied under a lease by the tenant.

small business – has the same meaning given in the *Small Business Development Corporation Act 1983 (WA)* section 3(1).

small commercial lease – means:

- a retail shop lease as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*;
- a lease where the premises are used for the purpose of carrying on a small business as defined in the *Small Business Development Corporations Act 1983 (SBDC Act)*;
- a lease where the tenant is an incorporated association under the *Associations Incorporation Act 2015 (Associations Act)*; or
- a lease or class of lease prescribed by regulation.

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

Clause 4 Act binds the Crown

Provides that the Act applies to the Crown and captures land held or administered by the Crown and its authorities.

Clause 5 Application

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

Clause 6 Leases, contracts and agreements taken to be modified

Provides that the provisions of any lease or any other contract or agreement is taken to be modified to give effect to the operation of 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. Similarly any attempt to waive a right, remedy or benefit provided to a person under the Act has no effect.

Part 3 – Prohibited actions in respect of small commercial leases and related matters

Clause 8 Terms used: prohibited action

Provides that the term *prohibited action* means an action under or in respect of a small commercial lease (including seeking orders, or commencing proceedings in a court or tribunal) in relation to a number of specified actions.

The list of actions provided are:

- eviction of the tenant;
- exercising a right of re-entry;
- possession;
- recovery of land;
- distraint of goods;
- forfeiture;
- termination of the small commercial lease;
- damages;
- requiring a payment of interest on unpaid rent, or other unpaid amount of money payable under the commercial lease (including operating expenses);
- recovering the whole or part of any security under the small commercial lease (including a security bond);
- requiring performance of obligations under a guarantee, including making a demand on a bank guarantee;
- any other remedy against a tenant at common law or under a written law.

Clause 9 Prohibited action cannot be taken during emergency period

Except in the circumstances (if any) prescribed by regulations this clause prohibits a landlord from taking a prohibited action against a tenant during the emergency period for a breach of a small commercial lease that occurs during the emergency period that consists of:

- a failure to pay rent or any other amount owing under the lease including operating expenses;
- not opening their business at the hours or times specified in the small commercial lease; or
- any other act or omission that is prescribed in the regulations.

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

Provides that any action (or inaction) by a tenant that may be required by law in response to COVID-19 is not to be regarded as:

- a breach of a small commercial lease; or
- grounds for termination of a small commercial lease;
- grounds for the taking of any prohibited action under or in respect of the small commercial lease.

Clause 11 Rent increases prohibited during emergency period

Prohibits any increase in rent during the emergency period. There is an exception for rent or a component of rent determined by reference to turnover.

Clause 12 Prohibited actions taken, and other things occurring during relevant period

Provides that the term *relevant period* as used in this section means the period from 30 March 2020 (being the day after the first stage of the COVID-19 restrictions were implemented) to the day the Act receives Royal Assent.

Provides that if during the relevant period:

- a landlord has taken or commenced prohibited action;
- a landlord has taken or commenced the performance of any other measure that the landlord would not have been able to undertake or commence during the emergency period by virtue of the operation of this Act;
- the operation of the terms of a small commercial lease has had effect, or has a periodic or ongoing effect, contrary to the operation of this Act; or
- the rent payable under a small commercial lease has been increased contrary to the operation of the Act,

then those actions and/or terms are still valid and effective, but so far as the prohibited action or other measure remains incomplete or ongoing, or has a periodic or ongoing effect, it is taken to be stayed or suspended until the end of the emergency period.

Part 4 – Adopted code of conduct

Clause 13 Regulations may adopt code of conduct

Provides a head of power for the regulations to the Act to adopt a code of conduct relating to commercial leasing principles during the COVID-19 pandemic.

Provides the mechanism for adopting the code of conduct which includes either incorporating the code of conduct in the regulations or by reference.

Further provides that if the code of conduct is incorporated by reference then unless otherwise specified, the code of conduct is adopted as existing or in force when the regulations are made and any amendments to the code of conduct have no legal effect unless they are adopted later by regulations.

Enables the regulations to provide for:

- an adopted code of conduct to apply to a specified person or class of lease;
- for a specified class of persons to comply with the adopted code of conduct;
- or in a specified manner.

Part 5 – Resolution of disputes

Clause 14 Terms used

Provides the meaning for a number of key terms used in Part 4 of the Act.

- *Commissioner* is defined to mean the Small Business Commissioner.
- *dispute* includes a dispute between the parties to a lease, or one 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 the Act as well as a dispute under the code of conduct.
- *party* means the landlord or the tenant
- *Tribunal* means the State Administrative Tribunal.

Clause 15 Applications to Tribunal

Provides that either the landlord or tenant can apply to the Tribunal to determine a dispute.

Also provides that, for disputes in relation to small commercial leases or where the landlord is a small business, an application cannot be made unless:

- the Small Business Commissioner has issued a certificate in relation to the dispute (stating that the dispute cannot be resolved by the Commissioner or is unsuitable for alternative dispute resolution); or
- the parties have agreed to proceed to the Tribunal and no party has made an application to the Commissioner about the dispute.

The application must be made during the emergency period unless the matter has been before the Commissioner and the Commissioner has issued a certificate. In this case, the application can still be heard after the emergency period.

Clause 16 Tribunal's powers to make orders

Provides the Tribunal with broad powers to make any orders it considers appropriate to resolve the dispute including an order to pay money or requiring a party to do or stop doing something.

In relation to proceedings under this Act, provides the Tribunal with power to allow any equitable claim and give any equitable remedy that that Supreme Court may allow or give.

Directs the Tribunal in making orders under the Act relating to a code of conduct dispute to consider the financial impact of COVID-19 on the tenant's business and capacity to meet their obligations, as well as the landlord's financial capacity (where appropriate) and to take into consideration the principles of fairness and proportionality. The Tribunal may also consider the Commissioner's certificate.

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

Provides that if the lease to which a dispute relates is a small commercial lease or the landlord owns or operates a small business under the lease, then the parties can (during the emergency period) request the Commissioner attempt to resolve the dispute under section 15C of the *Small Business Development Corporation Act 1983* or undertake alternative dispute resolution under section 15E of that Act.

Clause 18 **Commissioner to issue certificate if dispute not resolved**

Provides that if requested by a party to the dispute, the Commissioner must issue a certificate for the Tribunal if satisfied that:

- the dispute is unlikely to be resolved through the alternative dispute resolution process;
- it would be unreasonable to commence alternative dispute proceedings in the particular circumstances; or
- this process has failed.

Provides the certificate must be in a form approved by the Commissioner and can include information about the conduct of the parties.

Clause 19 **Commissioner may intervene in Tribunal proceeding**

Provides the Commissioner with power to intervene in proceedings of the Tribunal.

Clause 20 **Relationship of this Part to *State Administrative Tribunal Act 2004***

Clarifies that the parties can still have a dispute dealt with through a compulsory conference or mediation process under the *State Administrative Tribunal Act 2004*.

Part 6 - Miscellaneous

Clause 21 Regulations

Provides a regulation making power for matters required or permitted under the Act or necessary to give effect to the Act.

Clause 22 Regulations may provide Act does not apply, or applies as modified, in certain circumstances or cases

Provides the ability for the making of regulations to specify that a provision of the Act does not apply or applies in a modified way in certain circumstances specified in the regulations.

Clause 23 Transitional regulations

Provides for the ability to make transitional regulations necessary to deal with a matter if there is not sufficient provision for that matter in the Act.

Clause 24 Repeal

Includes a sunset clause to provide that the Act is repealed at the end of the period of 12 months following the end of the emergency period.