
Summary of the *Commercial Tenancy (COVID-19 Response) Act 2020 (WA)*

1. Introduction

The public health measures implemented in response to COVID-19 have had significant negative impacts on most businesses, with many experiencing either a major decrease in customers or the total closure of their business.

The subsequent loss of revenue has meant many commercial tenants are struggling to pay their rent. In response to this, the *Commercial Tenancy (COVID-19 Response) Act 2020 (WA)* (**Act**) has been passed by the Western Australian Parliament to regulate how the non-payment of money owed under a lease will be dealt with during the COVID-19 pandemic.

2. What leases are subject to the Act?

The following types of leases are subject to the Act:¹

- (a) retail shop leases (as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*);
- (b) a lease where the tenant operates a small business* from the premises;
- (c) leases where the tenant is an incorporated association (as defined in the *Associations Incorporation Act 2015 (WA)*); and
- (d) any other lease which is prescribed under the regulations (no regulations are currently in effect).

*a small business is defined as a business which:²

- (a) is owned and operated solely by:
 - (i) an individual;
 - (ii) individuals in a partnership; or
 - (iii) a proprietary company (as defined in the *Corporations Act 2001 (Cth)*);
- (b) has a relatively small market share;
- (c) is personally managed by the owner, owners or directors of the company; and
- (d) is not a subsidiary of or part of a large business.

¹ *Commercial Tenancies (COVID-19 Response) Act 2020 (WA)* s 3 (definition of “small commercial lease”).

² *Ibid* s 3 (definition of “small business”); *Small Business Development Corporation Act 1983 (WA)* s 3 (definition of “small business”).

Summary of the *Commercial Tenancy (COVID-19 Response) Act 2020 (WA)*

Alternatively, a small business is a business which has been declared to be one by the Governor of Western Australia.

3. What leases are not subject to the Act?

The following types of leases are not subject to the Act:³

- (a) long-stay agreement that is subject to the *Residential Parks (Long-stay Tenants) Act 2006 (WA)*;
- (b) a residential tenancy agreement that is subject to the *Residential Tenancies Act 1987 (WA)*;
- (c) a pastoral lease (as defined in the *Land Administration Act 1997 (WA)*);
- (d) a mining tenement (as defined in the *Mining Act 1978 (WA)*); and
- (e) any lease, sub-lease, licence or other agreement which is prescribed under the regulations (no regulations are currently in effect).

4. No contracting out or waiver

The Act provides that the relevant provisions of any lease or agreement are considered modified to the extent required to comply with the Act.⁴ Additionally, any provision which attempts to ‘contract out’ or provide a waiver of rights in respect of the Act are considered to be of no effect.⁵

5. Prohibition of enforcement actions

If a tenant:⁶

- (a) fails to pay rent or any other amount payable under the lease;
- (b) fails to open their business during the hours specified in the lease; or
- (c) performs any act or fails to perform any act prescribed by the regulations,

then from 30 March 2020 until 29 September 2020 (or another date if prescribed by the regulations) (**Emergency Period**), the landlord **cannot** exercise any of the following remedies:⁷

³ *Commercial Tenancies (COVID-19 Response) Act 2020 (WA)* s 3 (definition of “lease”)

⁴ *Ibid* s 6.

⁵ *Ibid* s 7.

⁶ *Ibid* s 9.

⁷ *Ibid* ss 8, 9.

Summary of the *Commercial Tenancy (COVID-19 Response) Act 2020 (WA)*

- (a) eviction of the tenant from the premises;
- (b) exercise of the right of re-entry to the premises;
- (c) exercise of the right to possession of the premises;
- (d) recover the land;
- (e) distraint of goods;
- (f) forfeiture;
- (g) terminate the lease;
- (h) seek damages from the tenant;
- (i) require a payment of interest on unpaid rent or on any other unpaid amount of money payable by the tenant to the landlord;
- (j) recovery of the whole or part of any security for the performance of the tenant's obligations under the lease (including a security bond);
- (k) performance of obligations by the tenant or any other person under a guarantee given in respect of the lease (including making a demand on a bank guarantee);
- (l) any other remedy otherwise available to the landlord against the tenant at common law or under a written law.

(together, **Enforcement Actions**)

It is important to note that this provision only prevents the exercise of the Enforcement Actions during the Emergency Period. It does not prevent the exercise of the Enforcement Actions against the tenant for a default during the Emergency Period, if the action is taken **after** the Emergency Period ends. This means that if the tenant simply fails to pay rent which is due and payable during the Emergency Period, the landlord can exercise any of the Enforcement Actions against the tenant after the Emergency Period.

Additionally, these restrictions are only for the tenant's defaults which are listed above, so landlord may (subject to the lease) still exercise any of the Enforcement Actions against the tenant for other defaults under their lease during the Emergency Period. An example of this would be the use of the premises for a use other than the use permitted under the lease.

Summary of the *Commercial Tenancy (COVID-19 Response) Act 2020 (WA)*

6. Prohibition on rent increases

The Act prevents an increase in rent during the Emergency Period, unless the rent is calculated on the basis of the tenant's turnover.⁸ Please note that there are already restrictions that apply as to when rent can be increased based on turnover for leases that fall under the *Commercial Tenancy (Retail Tenancy) Agreements Act 1985 (WA)*.

7. Enforcement Actions or rent increases prior to the Act

If between 30 March 2020 and 23 April 2020, the:

- (a) landlord exercised one of the Enforcement Actions;
- (b) landlord has taken any action which is otherwise prohibited under the Act;
- (c) lease has operated contrary to the Act; or
- (d) rent has increased contrary to the Act;

then the action taken or rent increase is to be suspended until the end of the Emergency Period.⁹

8. Code of Conduct

The Act provides that the regulations may adopt a Code of Conduct, which would then apply to leases that are covered by the Act.¹⁰ The Code of Conduct will be based on the Commonwealth code of conduct released in early April, but until it has been adopted in regulations made under the Act, it has no legal effect. The purpose of the Code of Conduct is to set out a number of principles which must be followed in relation to negotiations between landlords and tenants during the Emergency Period. It is also proposed to include provisions for minimum level of rent waivers and a minimum length of time for payment deferrals.

9. Dispute Resolution

Small Business Commissioner

During the Emergency Period, a party to one or more of the following types of dispute can request that the Small Business Commissioner assist in resolving the dispute:¹¹

⁸ Ibid s 11.

⁹ Ibid s 12.

¹⁰ Ibid s 13.

¹¹ Ibid ss 14(1), 18.

Summary of the *Commercial Tenancy (COVID-19 Response) Act 2020 (WA)*

- (a) dispute between any party to a lease (including any guarantor) as to the operation of the Act on the lease;
- (b) dispute which arises as a result of the Code of Conduct (which is yet to be adopted in WA); or
- (c) the landlord disputing that the tenant's failure to pay rent or any other amount of money payable was not due to financial hardship suffered as a result of the COVID-19 pandemic, and the landlord has failed to grant a waiver, reduction or deferment of payment to the tenant.

A party to the dispute may request that the Small Business Commissioner issue a certificate which states that the Small Business Commissioner believes the dispute is unlikely to be resolved by dispute resolution or dispute resolution has failed or is unreasonable (**Certificate**).¹²

State Administrative Tribunal

The parties to one of the above disputes can also seek that the dispute be heard by the State Administrative Tribunal, but only if:¹³

- (a) no party to the dispute has requested that the Small Business Commissioner assist with the dispute; or
- (b) a Certificate has been issued to the parties by the Small Business Commissioner.

The State Administrative Tribunal can then make a number of orders, including (but not limited to):¹⁴

- (a) requiring a party to the proceedings pay money to someone;
- (b) requiring a party to do or not do any act;
- (c) for proceedings which relate to the Code of Conduct, an order that a specified amount of rent be waived or deferred;
- (d) for proceedings relating to the financial hardship of the tenant, an order to terminate the lease;
- (e) dismissing the proceedings; or
- (f) any other order considered to be necessary.

¹² Ibid s 19.

¹³ Ibid s 16(4).

¹⁴ Ibid s 17.

10. Future Developments

Regulations

As mentioned in this summary, the Act provides for certain things to be prescribed by regulation, such as additional types of breaches which are covered by this Act or the adoption of a Code of Conduct. Once these regulations have been made, it will expand and/or restrict the scope and operation of the Act, and so further consideration of how it will apply to commercial leases will need to be considered.

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

This Bill has been put before Parliament for consideration, and would provide tenants under 'severe financial stress' the right to terminate their commercial lease with no liability for the balance of the term, provided that certain processes have been followed.¹⁵

However, the WA Government has stated that they will not progress this proposed law unless there is widespread evidence of landlords failing to negotiate in good faith under the Act.¹⁶

¹⁵ Commercial Tenancies (COVID-19 (Early Termination)) Bill 2020 (WA).

¹⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 April 2020, p2298b-2299a (John Quigley).