New laws impacting tenants and landlords of commercial tenancy leases in WA

By Catherine Wheeler / 21 April 2020
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Worthwhile read for: Small Business Owners, Commercial Tenants, Landlords

The Commercial Tenancies (COVID-19 Response) Bill 2020 (WA) (CTRB) and the Commercial Tenancies (COVID-19 Response (Early Termination)) Bill 2020 (WA) (Early Termination Bill) are currently being considered in the Western Australian Parliament. These bills seek to introduce urgent new measures to minimise the financial impact on tenants of small commercial leases caused by the restrictions implemented by the government to combat the COVID-19 pandemic.

At the time of writing, the CTRB has been passed and is waiting Royal Assent, and the Early Termination Bill is still being considered in the WA Legislative Assembly.

New measures

The CTRB introduces the following new measures:

- a six month moratorium on evictions due to non-payment of rent;
- a freeze on rent increases (excepting turnover rent);
- restrictions on penalties for tenants who do not trade or reduce their trading hours;
- prohibitions on charging interest on rent arrears;
- prohibitions on landlords making a claim on security such as bank guarantees and security deposits;
- the introduction of a dispute resolution process; and
- the adoption of a prescribed code of conduct.

The Early Termination Bill allows a tenant in severe financial distress to terminate its lease early.

Do the new measures apply to all commercial tenancies?

No, these new measures will only apply to small commercial leases.

A small commercial lease is:

- a retail shop lease (as defined in the Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA));
- a lease where the premises are used for a small business* (as defined in the Small Business Development Corporations Act 1983 (WA));
- a lease to an incorporated association; or
- a lease prescribed by regulation.

(*A small business is a business undertaking which is wholly owned and operated by an individual or a partnership or a proprietary company which has a relatively small share of the market in which it competes, is managed personally by the owners or directors and is not a subsidiary of or does not form part of a larger business or enterprise.)

The definition of lease is very broad and means any agreement under which a person is granted a
right to occupy land or premises, including a licence, whether orally or in writing, and whether or not the right to occupy is exclusive.

**Prohibited actions**

A landlord is precluded from taking certain action (a prohibited action) during the emergency period (which commences on 30 March 2020 and ends on 29 September 2020, unless otherwise prescribed) against a tenant of a small commercial lease including:

- eviction of the tenant;
- exercising a right of re-entry or taking possession of the premises;
- termination; and
- recovering security including performance of obligations under a guarantee or making demand under a bank guarantee

on the grounds that the tenant has breached the small commercial lease by way of failure to pay rent, for not opening their business at specified hours or times or for any other act or omission prescribed in the regulations.

There is a carve-out for any prohibited actions taken by the landlord in the period between 30 March 2020 and the date the CTRB receives Royal Assent. Such action will still be valid, but insofar as the action is ongoing, it is to be stayed or suspended until the end of the emergency period.

**Prescribed code of conduct**

The CTRB provides a mechanism for adopting a code of conduct relating to commercial leasing principles during the COVID-19 pandemic in the regulations or by reference.

The National Cabinet in conjunction with industry groups and key stakeholders developed what was to become a legislated code of conduct for tenants and landlords in each State and Territory (the National Code). To date, it is unclear whether the National Code will be adopted in Western Australia or a modified version of it. We will monitor and report any developments as and when they occur.

Please refer to our earlier alert for more information on the National Code.

**Dispute resolution**

Either the landlord or the tenant can apply to the State Administrative Tribunal to determine disputes.

The Tribunal has broad powers to make orders it considers appropriate, and in the case of a “code of conduct dispute” the Tribunal must 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 principles of fairness and proportionality.

The Legislative Council has, at the time of writing, proposed amendments to the CTRB to include reference to financial hardship disputes. It is proposed to include reference to financial hardship disputes, “financial hardship”, being financial hardship suffered by the tenant as a result of 1 or more of:

- 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; or
- any other consequences of the COVID-19 pandemic.
Under the proposed amendments, the Tribunal’s powers would include the power in case of a financial hardship dispute to make an order terminating a lease if satisfied the tenant’s breach was a result of the tenant suffering financial hardship.

**Sunset date**

The CTRB has a finite life: it is repealed 12 months after the end of the emergency period.

**Early Termination Bill**

To further mitigate the financial hardship caused by the COVID-19 pandemic, tenants of small commercial leases (or any other-prescribed leases) experiencing severe financial distress can elect to terminate their lease at any time during the emergency period.

A tenant is considered to be in severe financial distress if:

- the tenant is suffering financial hardship as a result of the COVID-19 pandemic;
- the tenant has made reasonable endeavours to negotiate waivers or deferrals of rent with their landlord;
- despite these negotiations and any waiver or deferral of rent made by the landlord, it is reasonable to conclude that because of financial hardship the tenant is not or will not at some later time, be able to perform its obligations under the lease; and
- any other requirements that are prescribed by the regulations are met.

**Early termination process**

The tenant may at any time during the emergency period give 14 days’ written notice to the landlord proposing termination of the commercial lease.

Within 14 days of the notice the landlord may give notice either agreeing to the termination or stating they intend to make an application to the Tribunal to determine whether the lease is to be terminated.

If the landlord fails to give that notice, the lease terminates 21 days after the tenant’s notice.

If the landlord disputes the matter, it must apply to the Tribunal within 7 days and the Tribunal must consider whether the tenant is in severe financial distress and if it is so satisfied, the Tribunal may make an order the lease is terminated and on what date. If the Tribunal is not so satisfied, the Tribunal may make an order for waiver or deferral of rent or any other concession.

If the lease terminates, the tenant must pay outstanding rent which was owing before the commencement of the emergency period, and must leave the premises reasonably clean and tidy and in the state required by the lease on expiry. The landlord can recover from any security held the cost of putting the premises in that state, and must return the balance of the security to the tenant.

**Sunset date**

Like the CTRB the Early Termination Bill will be repealed 12 months after the end of the emergency period.
The Early Termination Bill is yet to receive Royal Assent.
Further developments

We will continue to follow the progress of the Bills and provide updates when available.

If you would like further information in relation to these Bills and how they may impact your tenancy, please contact our Commercial Property team.

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