



Western Australia

Commercial Tenancies (COVID-19 Response) Act 2020

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Commercial Tenancies (COVID-19 Response) Act 2020

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Defined terms



Western Australia

Commercial Tenancies (COVID-19 Response) Act 2020

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:

Part 1 — Preliminary

1. Short title

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

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 comes into operation on the day on which this Act receives the Royal Assent (*assent day*);
- (b) Parts 2 and 3 are deemed to have come into operation on 30 March 2020;
- (c) the rest of the Act comes into operation on the day after assent day.

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 ¹; 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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- (b) does not include any of the following —
- (i) a long-stay agreement to which the *Residential Parks (Long-stay Tenants) Act 2006* applies;
 - (ii) a residential tenancy agreement to which the *Residential Tenancies Act 1987* applies;
 - (iii) a pastoral lease as defined in the *Land Administration Act 1997* section 3;
 - (iv) a mining tenement as defined in the *Mining Act 1978* section 8;
 - (v) any other lease, sub-lease, licence or other agreement that is of a class prescribed by regulations for the purposes of this paragraph;

operating expenses has the meaning given in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* section 12(3);

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

small commercial lease means —

- (a) a retail shop lease as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* section 3(1); or
- (b) a lease where the tenant owns or operates a small business and uses the land or premises that are the subject of the lease for the purpose of carrying on that business; or
- (c) a lease where the tenant is an incorporated association as defined in the *Associations Incorporation Act 2015* section 3; or
- (d) any other lease that is of a class prescribed by regulations for the purposes of this paragraph;

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

4. Act binds Crown

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

5. Application

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

6. Leases, contracts and agreements taken to be modified

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

7. No contracting out

- (1) A lease or any other contract or agreement is of no effect to the extent that it purports to exclude or restrict the operation of this Act.
- (2) A purported waiver of a right, remedy or benefit conferred on a person under this Act is of no effect.

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

8. Term used: prohibited action

In this Part —

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

- (a) eviction of the tenant from the land or premises that are the subject of the small commercial lease;
- (b) exercising a right of re-entry to the land or premises that are the subject of the small commercial lease;
- (c) possession;
- (d) recovery of land;
- (e) distraint of goods;
- (f) forfeiture;
- (g) termination of the small commercial lease;
- (h) damages;
- (i) requiring a payment of interest on unpaid rent or on any other unpaid amount of money payable by the tenant to the landlord under the small commercial lease (including, without limitation, operating expenses);
- (j) recovery of the whole or part of any security for the performance of the tenant's obligations under the small commercial lease (including, without limitation, a security bond);
- (k) performance of obligations by the tenant or any other person under a guarantee given in respect of the small commercial lease (including, without limitation, 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.

9.^{1M} Prohibited action cannot be taken during emergency period

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

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

[Section 9: modified by the Commercial Tenancies (COVID-19 Response) Regulations 2020 r. 4AA. See endnote 1M.]

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

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

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

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11. Rent increases prohibited during emergency period

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

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

(1) In this section —

relevant period means the period —

- (a) beginning on 30 March 2020; and
- (b) ending on the day on which this Act receives the Royal Assent.

(2) This section applies if, during the relevant period —

- (a) a landlord has taken or commenced prohibited action (including a prohibited action that has a periodic or ongoing effect); or
- (b) a landlord has taken or commenced the performance of any other measure (including a measure that has a periodic or ongoing effect) that the landlord would not have been able to undertake or commence during the emergency period by virtue of the operation of this Part; or
- (c) 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 Part; or
- (d) without limiting paragraphs (a) to (c), rent payable under a small commercial lease has been increased contrary to the operation of this Part.

(3) The prohibited action or other measure is as valid and effective as it would have been had this Part not come into operation 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.

- (4) The effect of the operation of the terms of the small commercial lease is as valid and effective as it would have been had this Part not come into operation but, so far as the effect of the operation of those terms 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.
- (5) The increase in rent is as valid and effective as it would have been had this Part not come into operation but the increase is taken to be stayed or suspended until the end of the emergency period.

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 small commercial lease 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 small commercial lease that is of a specified class; and

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

Part 5 — Resolution of disputes

14. Terms used

(1) 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 —

(i) a code of conduct dispute; and

(ii) a financial hardship dispute;

financial hardship, in relation to a tenant, means financial hardship suffered by the tenant as a result of 1 or more of the following —

(a) a restriction imposed under a written law in response to the COVID-19 pandemic;

(b) changes in societal behaviour in response to the COVID-19 pandemic;

(c) any other consequences of the COVID-19 pandemic;

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

Tribunal means the State Administrative Tribunal.

- (2) For the purposes of this Part, a *financial hardship dispute* is a dispute between the parties to a small commercial lease in the following situation —
- (a) during the emergency period, the tenant has breached the small commercial lease by failing to pay rent or any other amount of money payable by the tenant to the landlord under the small commercial lease (including, without limitation, a requirement under the lease to pay all or any of the landlord's operating expenses); and
 - (b) the landlord claims that the breach was not a result of the tenant suffering financial hardship; and
 - (c) the landlord has not granted the tenant a waiver, deferral or reduction in respect of the unpaid rent or other unpaid amount of money.

15. Relationship with section 9

Nothing in section 9 prevents a landlord from making a request to the Commissioner under section 18, or an application to the Tribunal under section 16, in relation to a financial hardship dispute.

16.^{1M} 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 19 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.

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- (4) An application in respect of the dispute cannot be made to the Tribunal under subsection (1) unless —
 - (a) none of the parties to the dispute has made a request to the Commissioner under section 18 in respect of the dispute and the parties agree that the application can be made; or
 - (b) the Commissioner has issued a certificate under section 19 in respect of the dispute.
- (5) Subsection (4) does not apply to a dispute that is of a class prescribed by regulations for the purposes of this subsection.
- (6) A copy of an application under subsection (1) that is required to be given under the *State Administrative Tribunal Act 2004* section 45(1) must be given in the manner and time (if any) prescribed by regulations for the purposes of this subsection.
- (7) Nothing in this section prevents a person making a request to the Commissioner under section 18.

[Section 16: modified by the Commercial Tenancies (COVID-19 Response) Regulations 2020 r. 4D. See endnote 1M.]

17. Tribunal's powers to make orders

- (1) In this section —
specified, in relation to an order, means specified in the order.
- (2) Without limiting any power to make an order that is conferred by the *State Administrative Tribunal Act 2004*, in proceedings under this Act the Tribunal may make any order that it considers appropriate to resolve the dispute or proceedings.
- (3) Without limitation, the orders that can be made by the Tribunal include the following —
 - (a) an order that requires a party to the proceedings to pay money to a specified person;

- (b) an order for a party to the proceedings to do, or refrain from doing, any specified thing;
 - (c) if the proceedings relate to a code of conduct dispute — any order that the Tribunal considers appropriate to give effect to the approved code of conduct including, without limitation, 1 or both of the following —
 - (i) an order that a specified amount of rent payable under the lease to which the dispute relates be waived for a specified period;
 - (ii) an order that a specified amount of rent payable under the lease to which the dispute relates be deferred and paid in a specified timeframe;
 - (d) if the proceedings relate to a financial hardship dispute — an order terminating the small commercial lease;
 - (e) an order dismissing the proceedings;
 - (f) any ancillary order that the Tribunal considers necessary for the purpose of enabling an order under this section to have full effect.
- (4) In making an order in proceedings under this Act relating to a code of conduct dispute, the Tribunal must have regard to —
- (a) the financial impact of the COVID-19 pandemic on the tenant’s business and capacity to meet the tenant’s obligations under the lease; and
 - (b) the landlord’s financial capacity; and
 - (c) the principles of proportionality and fairness, and any other relevant principles, set out in the adopted code of conduct.
- (5) In proceedings relating to a financial hardship dispute, the Tribunal —
- (a) cannot make an order under subsection (3)(d), or any other order to the disadvantage of the tenant, unless

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satisfied that the tenant's breach was not a result of the tenant suffering financial hardship; and

- (b) must make an order under subsection (3)(e) if satisfied that the tenant's breach was a result of the tenant suffering financial hardship.
- (6) In making an order in any proceedings under this Act, including an order under the *State Administrative Tribunal Act 2004* section 87(2), the Tribunal may have regard to a certificate issued under section 19 that relates to the proceedings.
- (7) An order of the Tribunal requiring any thing to be done or discontinued may fix the time within which that thing is to be done or discontinued, as the case may be.
- (8) In proceedings under this Act, the Tribunal may allow any equitable claim or defence, and give any equitable remedy, that the Supreme Court may allow or give.

18.^{1M} Requests for resolution of disputes using *Small Business Development Corporation Act 1983* s. 15C or 15E

- (1) This section applies to a dispute if —
 - (a) the lease to which the dispute relates is a small commercial lease; or
 - (b) the landlord under the lease to which the dispute relates owns or operates a small business and the lease is granted in the course of that business.
- (2) A party to the dispute may, under this Act, request the Commissioner to —
 - (a) provide assistance to attempt to resolve the dispute under the *Small Business Development Corporation Act 1983* section 15C; or
 - (b) undertake alternative dispute resolution in respect of the dispute under the *Small Business Development Corporation Act 1983* section 15E.

- (3) The request must be made during the emergency period.
- (4) It is a function of the Commissioner to provide assistance to attempt to resolve disputes to which this section applies.

[Section 18: modified by the Commercial Tenancies (COVID-19 Response) Regulations 2020 r. 5A. See endnote 1M.]

19. Commissioner to issue certificate if dispute not resolved

- (1) If a request is made to the Commissioner under section 18 in relation to a dispute, the Commissioner must, on the request of a party to the dispute, issue a certificate to that person if the Commissioner is satisfied that —
 - (a) the dispute is unlikely to be resolved with the assistance of alternative dispute resolution; or
 - (b) it would not be reasonable in the circumstances to commence an alternative dispute resolution proceeding in respect of the dispute; or
 - (c) alternative dispute resolution has failed to resolve the dispute.
- (2) The certificate is to be in a form approved by the Commissioner and may include any information about the conduct of the parties to the dispute that the Commissioner considers appropriate in the circumstances.

20. Commissioner may intervene in Tribunal proceedings

The Commissioner may, at any time, intervene in proceedings of the Tribunal in relation to a dispute to which section 18 applies.

21. Relationship of this Part to State Administrative Tribunal Act 2004

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

Part 6 — Miscellaneous

22. Regulations

The Governor may make regulations prescribing matters —

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

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

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

24. Transitional regulations

- (1) In this section —
transitional matter —
 - (a) means a matter of a transitional nature that arises as a result of the enactment of this Act, including the making of any regulations under this Act; and
 - (b) includes a saving or application matter.
- (2) Regulations may prescribe all matters that are required or necessary or convenient to be prescribed for dealing with a transitional matter.

25. Repeal

This Act is repealed at the end of the period of 12 months that begins on the day after the day on which the emergency period ends².



Notes

This is a compilation of the *Commercial Tenancies (COVID-19 Response) Act 2020*.
For provisions that have come into operation see the compilation table.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Commercial Tenancies (COVID-19 Response) Act 2020</i>	19 of 2020	23 Apr 2020	Pt. 2 and 3: 30 Mar 2020 (see s. 2(b)); Pt. 1: 23 Apr 2020 (see s. 2(a)); Pt. 4-6: 24 Apr 2020 (see s. 2(c))

Other notes

^{1M} The *Commercial Tenancies (COVID-19 Response) Regulations 2020* are made under s. 23(1) of this Act. That provision authorises regulations to provide that a provision of this Act does not apply, or applies in a modified manner, to specified circumstances or cases.

If a section of this Act is modified by the *Commercial Tenancies (COVID-19 Response) Regulations 2020*, the section is identified by the superscript 1M appearing after the section number.

¹ The *Commercial Tenancies (COVID-19 Response) Regulations 2020* r. 2B prescribes 28 March 2021 for the purposes of this paragraph.

² This Act will be repealed on 28 March 2022 (see the definition of **emergency period** in s. 3 and the *Commercial Tenancies (COVID-19 Response) Regulations 2020* r. 2B).

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
financial hardship	14(1)
land	3
landlord	3
lease	3
operating expenses	3
party	14(1)
premises	3
prohibited action	8
relevant period	12(1)
rent	3
small business	3
small commercial lease	3
specified	13(1), 17(1)
tenant	3
transitional matter	24(1)
Tribunal	14(1)