

COVID-19: WA enacts commercial tenancies legislation but still has to adopt a code fully implementing the national code of conduct

Source: [Western Australia Legislation](#)

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Abstract:

As noted in our update on 9 April 2020 ([COVID-19 — National Cabinet approves a mandatory code of conduct for commercial tenancies](#)), it was announced by the Prime Minister on 7 April 2020 that the national mandatory code of conduct for commercial tenancies affected by the COVID-19 pandemic (**Code of Conduct**) would be given effect in each state and territory through state and territory legislation. This legislation will, during the COVID-19 pandemic, modify the operation of:

- the provisions of commercial leases (including retail, office and industrial leases); and
- state and territory legislation relating to commercial and retail leases,

to provide relief to commercial tenants suffering financial stress or hardship as a direct result of the COVID-19 pandemic.

Commercial tenancies legislation enacted in Western Australia

The WA government has enacted the [Commercial Tenancies \(COVID-19 Response\) Act \(WA\)](#) (“**Act**”), which was assented to on 23 April 2020.

When does the Act take effect?

The provisions of the Act dealing with prohibited actions (see below) take effect from 30 March 2020. The remainder of the Act takes effect from 24 April 2020.

How long will the Act be in operation?

The Act will be repealed 12 months after the end of the “emergency period” which is defined in the Act as:

- beginning on 30 March 2020; and
- ending on a day prescribed by regulations or 29 September 2020 (if a day is not prescribed before 29 September 2020)(“**emergency period**”).

In effect, this means that (unless another date is prescribed before 29 September 2020):

- the emergency period will last until 29 September 2020; and
- the Act will be automatically repealed on 28 September 2021.

Who does the Act apply to?

The Act applies to leases (including subleases and licences) which are “small commercial leases”. A “small commercial lease” means a:

- a retail shop lease (as defined in s3(1) of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA));
- a lease where the tenant owns or operates a small business (as defined in s3(1) of the *Small Business Development Corporations Act 1983* (WA))(“**small business**”);
- a lease where the tenant is an incorporated association (as defined in s3 of the *Associations Incorporation Act 2015* (WA)); or
- any other lease that is prescribed by regulations (“**small commercial lease**”).

What does the Act provide?

- **No contracting out**

Landlords and tenants cannot exclude or restrict the operation of the Act. Any purported waiver of a right, remedy or benefit conferred on a person under the Act has no effect.

- **No prohibited actions**

Landlords cannot take certain actions in respect of small commercial leases (including seeking orders or commencing proceedings in a court or tribunal), including for:

- eviction of tenants;
- exercising rights of re-entry;
- possession;
- termination;
- damages;
- payment of interest on unpaid rent or other unpaid money payable;
- recovery of any security (e.g. security bond or bank guarantee); and
- performance of obligations by a tenant or any personal guarantors,

(“**prohibited actions**”) during the emergency period on the grounds of breaches by tenants during the emergency period, where the breaches consist of:

- a failure to pay rent or any other amount of money payable by tenants under leases;
- businesses not being open for business during the hours or times specified in leases;
- any acts or omissions of tenants that are required under a written law in response to the COVID-19 pandemic; or
- any other acts or omissions prescribed by regulations.

- **Tenants’ acts or omissions required by law not regarded as breaches**

Any acts for omissions by tenants under small commercial leases during the emergency period that are required in order to comply with laws that have been made in response to the COVID-19 pandemic (e.g. restricting trade or closing a business) cannot be regarded as breaches, grounds for termination or grounds for taking any prohibited action by landlords.

- **No rent increases**

Landlords cannot increase rent (other than turnover rent) under small commercial leases during the emergency period.

- **Stay on prohibited actions and rent increases between 30 March and 23 April**

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

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

the prohibited action/measure or the effect of the lease (in so far as they remain incomplete or ongoing) or the rent increase is taken to be stayed until the end of the emergency period.

- **Adoption of a code of conduct**

Regulations may adopt a code of conduct relating to small commercial lease principles during the COVID-19 pandemic. The WA government has [stated](#) that it intends to adopt, by

regulation, a code of conduct in WA which will implement the leasing principles contained in the national Code of Conduct.

- **SAT to determine disputes**

A landlord or a tenant may apply to the [WA State Administrative Tribunal \(SAT\)](#) during the emergency period to have a dispute determined. A dispute includes:

- a code of conduct dispute (once the code of conduct is adopted); and
- a financial hardship dispute.

A **financial hardship dispute** is a dispute between the parties to a small commercial lease where:

- during the emergency period, the tenant has breached the lease by failing to pay rent or any other amount of money payable;
- a landlord claims that the breach was **not** a result of the tenant suffering financial hardship (which means financial hardship suffered by a tenant as a result of a restriction imposed by law or changes in societal behaviour in response to the COVID-19 pandemic or any other consequences of the COVID-19 pandemic); and
- the landlord has **not** granted the tenant a waiver, deferral or reduction in respect of the unpaid rent or other unpaid amount.

An application can only be made to SAT if:

- a party to the dispute has not already requested dispute resolution assistance from the [Small Business Commissioner](#) (see below) and the parties agree that the application can be made to SAT; or
- the Small Business Commissioner has issued a certificate stating that the dispute cannot be resolved through alternative dispute resolution (see below).

SAT can order:

- a party to pay money to a specified person;
- a party to refrain from doing any specified thing;
- (if the proceedings relate to a code of conduct dispute) that a specified amount of rent payable under a lease be waived for a specified period or be deferred and paid in a specified timeframe; or
- (if the proceedings relate to a financial hardship dispute) the termination of a lease.

In making an order relating to a **code of conduct dispute**, SAT must have regard to:

- the financial impact of the COVID-19 pandemic on the tenant's business and capacity to meet the tenant's obligations under the lease;
- the landlord's financial capacity; and
- the principles of proportionality and fairness, and any other relevant principles, set out in the adopted code of conduct.

In a **financial hardship dispute**, SAT:

- cannot terminate a small commercial lease or make any other order to the disadvantage of the tenant, unless satisfied that the tenant's breach was not a result of the tenant suffering financial hardship; and
- must dismiss the application if satisfied that the tenant's breach was a result of the tenant suffering financial hardship.

- **Resolution of disputes by the Small Business Commissioner**

A party to a dispute may, during the emergency period, request the [Small Business Commissioner](#) to provide assistance to attempt to resolve the dispute or undertake alternative dispute resolution in respect of the dispute, i.e. before making an application to SAT.

If a request is so made, the Small Business Commissioner must, on the request of a party to the dispute, issue a certificate to that person if the Small Business Commissioner is satisfied that:

- the dispute is unlikely to be resolved with the assistance of alternative dispute resolution;
- it would not be reasonable in the circumstances to commence an alternative dispute resolution proceeding in respect of the dispute; or
- alternative dispute resolution has failed to resolve the dispute.

Does the Act give full effect to the Code of Conduct?

No. The Act only partly implements the leasing principles in the Code of Conduct. The Act does not:

- require landlords to offer proportionate rent reductions, by way of a waiver or a deferral;
- provide for any “reasonable recovery period”;
- require landlords to pass on the benefit of loan payment deferrals or any reduction in statutory charges or insurance costs; or
- require tenants to comply with the terms of their commercial leases (subject to any agreed amendments).

It is expected that these principles will be covered in the WA code which should be adopted by regulation in the next few weeks.

See our summary of the Code of Conduct in our update on 9 April 2020 ([COVID-19 – National Cabinet approves a mandatory code of conduct for commercial tenancies](#)).

What issues arise from the Act?

- As noted above, there are presently no legislative provisions in force mandating rent relief leasing principles (e.g. providing for rent waivers or referrals). Given that these principles are likely to be included in the WA code, landlords and tenants in WA will probably have to wait until the WA code is adopted (which could take several weeks) before agreeing any formal temporary arrangements. Otherwise, any agreement may end up being in breach of the WA code and have to be revised at a later date.
- The Act does not appear to deal with any arrangements which have agreed between 30 March 2020 and 23 April 2020. It only puts a stay on prohibited actions and rent increases during that period. It is likely that the WA code will require parties to review these arrangements if they do not comply with the Act or the code.
- The national Code of Conduct is aimed specifically at small-medium sized business with an annual turnover under \$50 million and who are eligible businesses for the [JobKeeper](#) program. It seems that the Act also intends to only apply to similar sized businesses given that it applies to small commercial leases (as defined) but there does not appear to be any equivalent monetary thresholds to be applied in determining if the Act applies to a lease.
- It is not clear if landlords can take action during the emergency period for:
 - a failure to pay rent or any other amount of money payable under a lease; or
 - businesses not being open for business during the times specified in a lease,

before 30 March 2020, i.e. before the emergency period; however, the Act does not appear to prohibit the landlord from:

- taking any such action; or

- taking action during the emergency period for any other type of breach (except for any act/omission by a tenant which is required by law).
- Under the Act, landlords are prohibited from increasing rent (other than turnover rent) during the emergency period and any rent increase which took place during the period between 30 March 2020 and 23 April 2020 is stayed; however, it is not clear if any rent increases which are due to take place under a lease during the emergency period (i.e. under existing rent review provisions) will be lost or if they will also be stayed until after the emergency period.

It is likely that all of these issues will be dealt with in the WA code although we will have to wait and see if the Code of Conduct will be fully implemented or if it will be an altered version of it.

See our update on 22 April 2020 ([COVID-19 and commercial tenancies — questions raised by the mandatory code and what's next for landlords and tenants](#)).

What should landlords and tenants do?

Tenants who are suffering financial stress or hardship as a direct result of the COVID-19 pandemic will want to benefit from the protection of the Act and to negotiate any relief measures which are provided for in the WA code (when adopted). Landlords will need to ensure that they understand their rights and obligations under the Act and the WA code (when adopted). While the adoption of the WA code is awaited, parties should:

- determine if their lease is a “small commercial lease” (as defined in the Act);
- carefully review the Act to determine their rights and obligations;
- open communications between each other. Tenants should provide appropriate financial information about their businesses so that the landlords can verify their financial stress or hardship. Landlords can also request reasonable financial information; and
- probably ensure that any arrangements which are negotiated before the adoption of the WA code comply with the national Code of Conduct. Otherwise, it is likely that any such arrangements will have to be later renegotiated to comply with the WA code (once adopted).

Early termination bill also before parliament

Landlords and tenants should also monitor the progress of a new bill which is presently before the WA parliament, the [Commercial Tenancies \(COVID-19 \(Early Terminations\)\) Bill 2020 \(WA\)](#), and which, if passed, will confer a right on “small commercial lease” tenants to terminate their lease during the emergency period if they are in “severe financial hardship” without being required to pay the landlord compensation or damages. If a landlord disputes a termination, a landlord will still have a right to apply to SAT for a determination if the lease is to be terminated; however, it should be noted that the Bill has not progressed past its second reading in the Legislative Assembly on 16 April 2020 and the WA government has [stated](#) that the government will only proceed with this bill if there is evidence of widespread abuse by landlords of their obligation for good faith negotiations for rent relief for commercial tenants.