

Covid-19 and Small Commercial Leases Commercial Tenancies Covid-19

By David Nicholson

Introduction

The *Commercial Tenancies (COVID-19 Response) Act 2020 (Act)* came into effect on 24 April 2020 in response to the impact of the COVID-19 pandemic on certain commercial tenancies, including retail tenancies, small businesses and incorporated associations.

The Act introduces a range of measures to alleviate the financial impact of the COVID-19 pandemic for tenants of small commercial leases including:

- a six month moratorium on termination for certain breaches;
- a freeze on rent increases; and
- a restriction on penalties for tenants who do not trade or reduce their trading hours;
- prohibitions on landlords taking action against a tenant for certain breaches.

The Act also allows for regulations to be made to adopt, as appropriate, the National Cabinet Mandatory Code of Conduct: SME Commercial Leasing Principles During COVID-19, released on 7 April 2020 (**National Code**).

The new laws will modify any small commercial lease to the extent necessary to give effect to the operation of the Act.

Emergency Period

The Act applies to small commercial leases during the emergency period, commencing 30 March 2020 for an initial period of 6 months (**Emergency Period**). The Emergency Period may be extended under the regulations as necessary.

The Act will be repealed 12 months after the end of the Emergency Period.

Small Commercial Lease

A small commercial lease is broadly defined to include the following:

1. retail shop lease, as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985*;

1. a lease where the tenant owns or operates a small business, as defined in the *Small Business Development Corporation Act 1983*, and uses the land or premises for the purpose of carrying on that business;
1. a lease where the tenant is an incorporated association as defined in the *Associations Incorporation Act 2015*; or
1. any other type of lease prescribed in the regulations (yet to be determined).

It is important to note that under the Act, a “lease” is defined to include sub-leases, licences, or any other agreement under which a person grants a right to another person to occupy land or premises, regardless of:

1. whether or not the right is a right of exclusive occupation; and
1. whether the lease, sub-lease, licence, or other agreement is made orally or in writing.

A number of leases are excluded under the Act including:

1. a long-stay agreement to which the *Residential Parks (Long-stay Tenants) Act 2006* applies;
1. a residential tenancy agreement to which the *Residential Tenancies Act 1987* applies;
1. a pastoral lease as defined in the *Land Administration Act 1997*, section 3;
1. a mining tenement as defined in the *Mining Act 1978* section 8;
1. any other lease, sublease, licence or other agreement that is of a class prescribed by regulations for the purpose of this paragraph.

Prohibited Action and Protective Measures

If during the Emergency Period, a tenant of a small commercial lease:

- a. fails to pay rent or any other amount payable by the tenant to the landlord under the small commercial lease;
- b. fails to open their business during the times specified in the lease; or
- c. otherwise breaches the lease in a manner set out in the regulations,

then, except in the circumstances prescribed by the regulations or permitted by the State Administrative Tribunal, a landlord cannot do any of the following things (**prohibited actions**):

1. terminate the lease, evict the tenant or re-enter the premises;
1. take action for damages, possession, recovery of land, distraint of goods or forfeiture;
1. require payment of interest on rent in arrears or any other unpaid amount;

1. make a claim on any form of security (for example bank guarantees or bond) for the performance of the tenant's obligations under the lease; or
1. exercise any remedy otherwise available to the landlord against the tenant.

In addition, the Act provides for a number of protective measures including:

1. a freeze on rent increases;
1. a prohibition on landlords progressing action against a tenant for a breach that occurred after 30 March 2020, but before the new laws came into operation; and
2. an enhanced dispute resolution process for disputes arising out of, or in relation to, the operation of the Act or the Code of Conduct (once introduced), including a mechanism to assist landlords where tenants are refusing to pay rent when they are not suffering financial hardship.

If a landlord has taken or commenced a prohibited action or other measure or increased the rent between 30 March 2020 and 24 April 2020, then the action, measure or increase in rent is valid and effective however, it is taken to be stayed or suspended until the end of the Emergency Period.

Landlord's rights

If during the Emergency Period a tenant has breached the small commercial lease by failing to pay rent or any other amount payable and:

1. the landlord claims that the breach was not a result of the tenant suffering financial hardship; and
1. the landlord has not granted the tenant a waiver, deferral or reduction in rent or other amount payable,

(referred to as a **financial hardship dispute**) then the landlord can apply to the State Administrative Tribunal or Small Business Commissioner to terminate the small commercial lease or resolve the dispute as appropriate.

Code of Conduct

The Act allows for regulations to be made to adopt a Code of Conduct.

It is expected that the Code of Conduct will closely follow the National Code and will provide a framework to assist landlords and tenants to negotiate and agree to measures for the provision of rent relief.

The National Code imposes a set of leasing principles on landlords that apply to certain commercial tenancies where the tenant is suffering financial stress or hardship as a result of the COVID-19 pandemic. The objective of the National Code is to share, in a proportionate, measured manner, the financial risk and cash flow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords. The National Code provides that rent relief granted by landlords should be proportionate to the losses suffered by a tenant due to a reduction in trade and should be a combination of waiver and deferral.

The WA Government is urgently working on the Code of Conduct and will make appropriate modifications for WA.

We will continue to monitor the progress of the regulations and Code of Conduct.

Commercial Tenancies (COVID-19 (Early Terminations) Bill 2020

On 16 April 2020, the *Commercial Tenancies (COVID-19 (Early Terminations)) Bill 2020 (Early Termination Bill)* was also introduced and if passed would allow tenants of small commercial leases to terminate a lease if they are in severe financial distress caused by the COVID-19 pandemic. If a tenant terminates on this ground, the tenant will not be required to pay the usual compensation or damages to the landlord associated with the early termination of the lease, often referred to as 'break lease costs'.

The Early Terminations Bill recognises in some instances there will be limited opportunity for a tenant's business to recover following the pandemic and measures, in addition to those provided under the Act, may be required for tenants who are experiencing several financial hardship to such an extent that the tenant is unable to perform its obligations under lease.

At the time of writing, it is not the Government's intention to proceed to list the second reading debate of the Early Terminations Bill and it will only do so if there is evidence of widespread abuse by landlords of their obligations for good faith negotiations for rent relief for commercial tenants as provided for in the Act.

Implications for Local Governments

The operation of the Act is not limited to the use of a premises for small business or retail purposes and will also apply to leases where the tenant is an incorporated association under the *Associations Incorporated Act 2015 (AI Act)*.

Local governments should also be aware that any licence or other agreement that grants to another person the right to occupy local government property, will be considered a lease for the purposes of the Act.

Local governments frequently grant sporting and community groups (which are more often than not incorporated associations under the AI Act) the right to occupy local government property for a broad range of purposes. For this reason, it is likely that a large number of local government leases will be caught by the operation of the Act.

For further information please contact David Nicholson by email to dnicholson@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.

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