

COVID-19: (AUSTRALIA) NEW WA COVID-19 LAWS SETS WIDER NET FOR IMPACTED LANDLORDS/TENANTS

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Australia Real Estate Alert

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**This information is accurate as of 11:00 A.M. 28 April 2020 and is subject to change as this situation evolves.*

WA's Parliament has fast-tracked into law the [Commercial Tenancies \(COVID-19 Response\) Act 2020 \(WA\)](#) (CTCR), setting the legal framework for the implementation of WA's COVID-19 relief measures for eligible commercial tenants.

Landlords and tenants potentially impacted by the new CTCR should remain alert and assess their options to best manage and mitigate, or utilise, the impacts of the new law. For some, the impacts will be drastic.

TOP FIVE KEY TAKE-OUTS

The new CTCR law:

- Widens targeted leases - the range of targeted WA leases is wider as compared to the leases initially targeted by the National Commercial Leasing Code (our previous alerts on the National Code can be found [here](#))
- Applies a moratorium - to prevent landlords pursuing 'prohibited actions' (including evictions, repossessions, terminations or exercising security) during the 'emergency period' on the grounds of certain types of breaches (including a failure to pay rent or outgoings) by tenants under 'small commercial leases'
- Awaits new WA Code - awaits a unique WA Leasing Code of Conduct to be introduced by regulation, which ultimately may be different from, and will apply instead of, the current National Code (the WA Attorney General has said the unique WA Code will be 'reflective' of the National Code and introduced in mid-May)
- Anticipates rent relief - anticipates that the WA Leasing Code of Conduct will include mandated rent waiver and deferral requirements when it is introduced (although the relief requirements may potentially differ from those under the current National Code)
- Sends disputes to SAT - entitles either the landlord or tenant to apply to the WA State Administrative Tribunal (SAT) to resolve disputes and invests the Tribunal with wide powers to make appropriate orders (when voluntary negotiations and/or mediations fail).

TAKE-OUT NO.1 - WIDENS TARGETED LEASES

The new CTCR law widens the range of targeted leases to the following (called 'small commercial leases'):

- Retail shop tenants - any retail shop lease (as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA))
- 'Small business' tenants - any lease where the premises are used for a 'small business' (which in turn is widely defined under the *Small Business Development Corporations Act 1983* (WA) and will include many small businesses and their leases¹)
- Incorporated association tenants - any lease to an incorporated association
- Other regulated tenants - any lease prescribed by regulation, which potentially will include leases already identified under the National Code, although this remains to be seen (ie leases to tenants eligible under the National JobKeeper scheme with an annual turnover under AUD50 million).

TAKE-OUT NO.2 - APPLIES A MORATORIUM

Landlords must not take certain actions ('prohibited actions') against a tenant of a 'small commercial lease' during the emergency period (which, unless otherwise prescribed, runs from 30 March 2020 to 29 September 2020).

This includes action to:

- evict a tenant
- exercise a right of re-entry or take possession of premises
- terminate a lease, or
- recover under any security (whether bank guarantee, bond, personal guarantee or otherwise)

which is based on:

- a failure to pay rent or any other amount payable under the lease (including any of the landlord's operating expenses)
- a failure to open for business at hours or times specified in the lease, or
- any further grounds specified by regulation.

TAKE-OUT NO.3 - AWAITS NEW WA CODE

The National Commercial Leasing Code has no legal force in WA, notwithstanding it being a creation of the National Cabinet (of which WA is a member). Our previous alerts on the National Code can be found [here](#).

A unique WA Leasing Code of Conduct is currently proposed by the WA Government to be adopted by regulation and so provide legal force. It may be different from the current National Code.

In parliament, the WA Attorney General has indicated the WA Code will be 'reflective' of the National Code, and that landlords and tenants can look to the '*code of conduct that has been suggested by the Prime Minister*' for '*some guidance*'.

TAKE-OUT NO.4 - ANTICIPATES RENT RELIEF

Whilst the CTCR contemplates there will be instances of rent relief disputes to be dealt with by the SAT, presently in WA there are no codified leasing principles with legal force to cover rent relief principles.

It remains unclear for the present how far the WA Leasing Code of Conduct will ultimately diverge from the National Code when it is finally regulated.

TAKE-OUT NO.5 - SENDS DISPUTES TO SAT

Either the landlord or tenant can apply to the SAT to resolve a 'dispute'.

However, as an initial gateway, an application to SAT cannot be made unless:

- no request has been made by any party to the dispute to the Small Business Commissioner to assist or undertake alternative dispute resolution, or
- the Commissioner issues a certificate (with the effect to allow an application to SAT).

A 'financial hardship dispute' is one of a range of 'disputes' the SAT may determine.

A 'financial hardship dispute' will essentially arise where a tenant fails to pay an amount of rent or other money claiming the failure is due to 'financial hardship' suffered by the tenant as a result of one or more of the following:

- 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 SAT's powers would include the power in the case of a financial hardship dispute to make an order terminating a lease if satisfied that the tenant's breach was not a result of the tenant suffering relevant COVID-19 'financial hardship'.

TOP FOUR NEXT STEPS

We suggest the following "*Top Four Next Steps*" for commercial landlords and tenants assessing the new CTCR and their options.

Consider whether you have 'small commercial lease(s)'

As noted, the CTCR only applies to 'small commercial leases' defined by reference to other WA laws or a lease that may be prescribed by regulation².

Whilst at the time of writing, no additional class of lease has been included by regulation, it appears possible, if not probable, that the foreshadowed WA Leasing Code of Conduct will, like the National Code, additionally include leases where the tenant is eligible for the national JobKeeper scheme and has an annual turnover of less than AUD50 million.

Check for potential eligibility for WA land tax relief

The WA Government has announced a package to grant up to AUD100 million for land tax relief for commercial landlords if they satisfy the eligibility criteria.

According to the announcement, to be eligible, commercial landlords must provide rent relief that equates to a minimum of three months' rent and 'freeze' outgoings to small businesses that have suffered at least a 30 per cent reduction in turnover due to COVID-19.

Eligible landlords will be able to claim 25 per cent off the 2019/20 land tax bill for the property in which an eligible tenant is provided relief.

The commercial rent relief grants will be administered through the Small Business Development Corporation, with applications opening 1 May 2020. For more information on eligibility criteria and how to apply, [click here](#).

Consider opening landlord and tenant communications

Landlords and tenants alike should carefully consider whether to open communication, and, if so, the timing and the form their communications will take.

Landlords impacted by the CTRC may, depending on their circumstances, consider it appropriate to open communications with select tenants by requesting reasonable details in an appropriately succinct questionnaire about the tenant's business and the past and expected impacts of the COVID-19 pandemic on turnover, profitability and trading.

Tenants impacted by the CTRC may, depending on their circumstances, consider it appropriate to open their communications with landlords by volunteering relevant details about the tenant's business and the past and expected impacts of the COVID-19 pandemic on turnover, profitability and trading.

Stay alert as new 'hammer' early termination legislation is waiting in the wings

New legislation currently before the WA Parliament would, if passed, allow 'small commercial lease' tenants to apply to terminate leases on the grounds of 'severe financial hardship'.

The Attorney General has referred to the *Commercial Tenancies (COVID-19 (Early Terminations)) Bill 2020* introduced on 16 April 2020 as a 'hammer'.

According to the Attorney General (Hansard 20 April 2020):

"... if there is evidence of widespread abuse by landlords that they are not bargaining in good faith, as set out in the code, I will be back here and on the orders of the day will be the legislative hammer to give small businesses the right to break the lease and walk. None of us want to see that."

As indicated, the Bill remains on the Legislative Assembly Notice Paper and the government has indicated that the Bill may progress if there is widespread failure of landlords to negotiate in good faith with tenants for rent relief.

If the Bill were passed in its current form, a tenant under a commercial lease suffering relevant 'severe financial hardship' would be entitled to give the landlord notice to terminate or break its lease early without financial penalty. The landlord if it disputes the termination can apply to the SAT for a determination whether the lease is to be terminated.

Landlords and tenants alike should stay alert for any further progress of this Bill. If it is passed the contemplated consequences will be potentially drastic for many landlords and tenants.

FOOTNOTES

¹ A 'small business' is a 'business undertaking which is wholly owned and operated by a proprietary company, an individual or a partnership of individuals, and which has a relatively small share of the market in which it competes, is managed personally by its directors or owners and is not a subsidiary of or does not form part of a larger business or enterprise' (section 3(1)).

² Regulations may be made under Commercial Tenancies (COVID-19 Response) Act 2020, section 21.

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