

# COMMERCIAL TENANCIES (COVID-19 RESPONSE) BILL 2020



The Western Australian Government recently introduced the *Commercial Tenancies (COVID-19 Response) Bill 2020* into State Parliament. The Bill has now passed the WA Parliament and has come into effect as the *Commercial Tenancies (COVID-19 Response) Act 2020 (Act)*.

The Act includes legislation to give legal effect to the Mandatory Code of Conduct released by the National Cabinet on 7 April 2020 to govern SME (Small and Medium Enterprise) commercial tenancies during the Coronavirus (COVID-19) pandemic period (**National Code**).

## The National Code

The National Code requires negotiations on commercial leases to be carried out in good faith by both parties and provides a framework for these negotiations where the tenant is suffering financial hardship as a result of the Coronavirus restrictions.

The framework considers the tenant's revenue, expenses and profitability to determine appropriate rent deferrals, reductions, or waivers.

There are 14 leasing principles to be applied by the National Code during the Coronavirus pandemic period (and in some circumstances also during a reasonable subsequent recovery period), which are to be applied on a case-by-case basis.

The National Code has not been legislated by the Commonwealth. It has been agreed that the Code will be implemented by the states and territories via separate legislation.

## Application to Western Australia

The Act legislates the following leasing principles from the National Code:

- Landlords **must not terminate leases** due to non-payment of rent (sections 8(g) and 9(a)).
- **No interest** should be applied with respect to unpaid rent (section 8(i)).
- Landlords **must not draw on a tenant's security** for the non-payment of rent (be this a cash bond, bank guarantee or personal guarantee) (section 8(j) and (k)).
- A **freeze on rent increases** (except for retail leases based on turnover rent), notwithstanding any arrangements between the landlord and the tenant (section 11).
- Landlords cannot apply any prohibition or levy any penalties against the tenant if the premises is not open for business at the hours or times specified in the lease (section 9(b)).

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The above leasing principles apply for the duration of the emergency period, which is defined as commencing on 30 March 2020 and ending on 29 September 2020 (unless otherwise prescribed).

The Act does not currently impose all of the National Code's 14 leasing principles. However, the Act provides for a Code of Conduct to be adopted which will form part of the WA legislation. No draft Code of Conduct has been released by the WA Government for public comment at this stage. It is likely however that the WA Code of Conduct will include some or all of the key recommendations proposed by the Federal Government as part of the National Code.

One key recommendation under the National Code, not covered in the Act, is that Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant's trade during the COVID-19 pandemic period **and a subsequent reasonable recovery period**. The Act does provide special powers to the State Administrative Tribunal to resolve lease disputes by making orders to waive or defer rent. **However, it is not clear at this stage whether a proportionate reduction in rent will be compelled on landlords as part of the WA Code of Conduct on similar terms as has been recommended under the National Code of Conduct.**

The detail of WA's Code of Conduct will therefore be critical to many commercial leases.

## **Disputes are coming**

A spike in tenancy disputes as a consequence of the Coronavirus pandemic is expected.

If you would like more information, then feel free to contact either Gino Terriaca, Tony Cassetai or Silvia Caratti of Maxim Private Advisory on (08) 9489 2555.

*Please note that this is general information only and professional advice should be obtained before acting on any information contained herein.*

**Updated 30 April 2020**

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