

DRAFT SECOND READING SPEECH**HON ELISE ARCHER MP*****COVID-19 Disease Emergency (Commercial Leases) Bill 2020*****check Hansard for delivery**

I move that the Bill now be read a second time.

Today I am pleased to introduce the COVID-19 Disease Emergency (Commercial Leases) Bill 2020.

This Bill is another step in delivering our Government's commitment to respond to the COVID-19 disease emergency and to manage the significant impact this pandemic has and is having on our businesses, our community and our economy.

As we continue with our Plan to stop the spread of coronavirus, and begin to turn our attention to rebuilding a stronger Tasmania, the best course of action remains to stay home and save lives.

Our first priority is to keep Tasmanians safe and secure, and that's why we made the tough decisions regarding temporary business closures, reduced trade, cancelled events and significant changes to how we work. There is no doubt that this has been difficult and challenging, and has had significant impact on everyone.

To support business during this period, the Tasmanian and Australian Governments have put in place a range of measures, including relief from taxes and charges, and loans and grants for businesses affected by the COVID-19 pandemic.

The purpose of this support is to ensure that businesses are able to hibernate and survive to be able to recover and drive growth and prosperity when the current restrictions are progressively lifted.

To further support these efforts, the National Cabinet, committed to the implementation of the Code of Conduct for commercial tenancies (the Code).

The purpose of the Code is to govern the conduct of tenants and landlords, and provide additional protections and rent reductions for tenants experiencing financial hardship.

I am aware that, by working together, many tenants and landlords have already negotiated changes to their leasing arrangements, including rent reductions and deferrals. I applaud these efforts.

The Code complements these efforts and provides an avenue for tenants that require additional protection or have not been able to come to an agreement with their landlord.

The Code is being implemented by states and territories through legislation or other means, where available. To be nationally consistent as much as possible, in Tasmania this is being done in two stages, namely:

- the first stage being on 9 April 2020 when the Premier introduced a Notice under the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* to prevent termination or rent increases (except rent based on turnover) to commercial leases for certain commercial tenants; and
- the second stage is today through the introduction of the *COVID-19 Disease Emergency (Commercial Leases) Bill 2020*. When passed, this legislation will give full effect to the Code in Tasmania.

The *COVID-19 Disease Emergency (Commercial Leases) Bill 2020* (the Bill) provides the legal framework for implementation of the Code in Tasmania. In particular, the Bill:

- outlines eligibility for the Code;
- requires relevant parties to act in good faith;
- prevents landlords from taking certain actions; and
- allows for rent reductions (through waivers and deferrals).

The Code is also supported by mediation arrangements.

I will now turn to the Bill in more detail.

Financial hardship period/financial hardship cessation day

The Bill provides for a financial hardship period. The purpose of the financial hardship period is to outline the period of time during which the provisions of the Act apply.

The financial hardship period is 1 April 2020 until the financial hardship cessation day.

The financial hardship cessation day is 12 months after commencement of the Act, or sooner, if determined by the Treasurer that the Code no longer needs to be in effect. This approach is similar to the approach taken for the purposes of other COVID-19 legislation.

Protected lease and eligible person

I will now turn to the concept of a protected lease.

A protected lease is a lease to which the provisions of the Bill, such as additional protections, apply. The Bill does this by modifying, to the extent necessary, the terms and conditions of a lease to give effect to its provisions.

To be a protected lease, a lease must be a commercial lease and the lessee must be an eligible person. A person in this context is a legal person, which includes companies and other entities.

An eligible person is a lessee that is eligible for the Commonwealth Government's JobKeeper program and is a Small Medium Enterprise (an SME) entity for the purposes of Commonwealth Government financial support.

In practice, this means that in the case of a business, the lessee has experienced at least a 30 per cent reduction in turnover when compared to the same period last year and has a turnover of up to \$50 million.

In the case of a charity, a reduction in turnover of only 15 per cent is required.

A lease is a protected lease from the time the lessee becomes an eligible person until the end of the financial hardship period.

I will now turn to the operation of the Bill as it applies to a protected lease.

Provision of information to support negotiations

Firstly, I will outline the obligations of the parties to a protected lease during the financial hardship period.

On commencement of the Act, both parties to a protected lease have an obligation to enter into negotiations, as soon as possible, with regard to the rent payable under the lease.

This includes providing the other party information that is both accurate and sufficient to enable negotiations to occur.

Examples of this would include financial and business information regarding the reduction of turnover of the lessee, or the level of relief being provided by government or banks to either party. Each party must also provide information to the other party that would assist them in applying for such relief.

In the context of the provision of this information, each party has a further obligation not to engage in misleading and deceptive conduct. To enforce this provision, penalties of up to 50 penalty units for an individual and up to 300 penalty units for a body corporate apply.

The Bill includes provisions that govern the use of any information provided by the other party. This information can only be used for the purposes it is provided – such as the negotiation of a rent reduction or to apply for financial support.

To enforce this requirement, the Bill includes penalties for the disclosure of any confidential information provided in the context of this Bill except:

- with consent from the party the information relates;
- for the purposes of seeking professional advice;
- for the purposes of mediation, dispute resolution or legal proceedings; or
- as required by law.

The penalty for disclosure of this information is also up to 50 penalty units for an individual and up to 300 penalty units for a body corporate.

Prohibited lessor actions for certain breaches during financial hardship period

During the financial hardship period, additional protections apply to the lessee of a protected lease.

These protections prevent the lessor from taking actions under the lease relating to certain breaches. These actions are known as prohibited lessor actions.

The prohibited lessor actions are:

- evicting the lessee from the premises to which a protected lease relates;
- exercising a right of re-entry to the premises to which a protected lease relates;
- recovering land;
- distraining goods;
- seeking forfeiture;
- seeking or recovering damages;

- requiring a payment of interest, or any other fee or charge, on unpaid rent otherwise payable by the lessee;
- recovering the whole or part of a security bond, or bank guarantee, under, or in relation to, the lease;
- requiring the performance of obligations by the lessee, or any other person, pursuant to a guarantee, or indemnity, relating to the lessee's obligations under the lease;
- taking possession;
- terminating the lease; or
- seeking or applying any other remedy otherwise available to a lessor against a lessee under an Act or the law of this State.

A lessor is unable to take these actions during the financial hardship period for breaches that relate to:

- unpaid rent or other moneys;
- a failure to meet sales or performance criteria; or
- a failure of the business to be open during the business hours or days specified by the lease.

The prohibited lessor actions only apply to these specified breaches. A lessor is able to exercise their rights, as per the lease agreement, for any other breaches during the financial hardship period. This could include for damage or nuisance, if provided for by the lease agreement. This is an important part of the Code, as it requires tenants to comply with the terms and conditions of their lease agreements, except where provided by the Code.

It is important to note that these protections only apply for the financial hardship period. For example, at the end of the financial hardship period, a lessor will be able to take a prohibited lessor action for unpaid rent, including to recover any unpaid rent.

No increase of rent

The Bill provides for no increases in rent under a protected lease during the financial hardship period.

This prevents an increase in rent, which would have occurred by virtue of the terms and the conditions of the lease agreement, from taking place.

The one exception to this in the Code is rent that is based on turnover. The Bill provides for this exception to be included by Regulations, following consultation on the definition.

Reduction of rent

The Code provides for a reduction of rent payable under a protected lease during the financial hardship period.

The rent is to be reduced in proportion to reduction of turnover of the lessee. For example, if a lessee has had a 30 per cent reduction in turnover, its rent is to be reduced by 30 per cent.

The Code further provides that at least 50 per cent of this reduction is to be in the form of a waiver, with the remainder able to be deferred. For the previous example this would mean that at least 15 per cent of the rent is waived, with 15 per cent deferred.

I would like to make a comment with regard to how the rent reductions have been included in the Bill. The Bill requires the parties to renegotiate the rent payable having regard to:

- the leasing principles as set out in the Code;
- the financial situation of the lessee and the lessor; and
- any prescribed matters.

In particular, I would like to point out that the Bill references the leasing principles in the Code instead of legislating them directly. This is to avoid significant additional complexity and technical detail in the Bill. To the extent necessary, regulations will be made to ensure that these provisions work effectively.

I would also note that by ensuring that any rent reductions are negotiated having regard to the financial situation of both the lessee and the lessor, outcomes which meet the needs of both parties are more likely to be achieved. This, while not included as a leasing principle in the Code, is consistent with its general aims to support case-by-case outcomes based on the situation of the parties. This is consistent with the approach of other states.

Mediation and arbitration

Consistent with the requirements of the Code, the Bill provides for mediation arrangements.

Unlike other jurisdictions, Tasmania does not have a Small Business Commission which provides a standing mediation service for small business.

As such, the Bill establishes the role of Mediation Provider. The Mediation Provider is able to mediate disputes and appoint others to do so.

The role of Mediation Provider will be performed by the Director of Consumer Affairs and Fair Trading. The Director plays a similar role for the Retail Leases Code and is the most appropriate person for this role. It is expected the Mediation Provider will appoint a panel of experienced professionals who have experience in commercial leasing matters to undertake these mediation services.

Parties to a protected lease are required to attempt to resolve a dispute by direct negotiation, in the first instance. Following this, either party is able to apply to the Mediation Provider for mediation of the dispute.

The Mediation Provider is able to mediate the dispute. This can include requiring the parties to provide information to support mediation of the dispute.

Notwithstanding these provisions, a party to a protected lease is able to seek to have a dispute arbitrated under the Commercial Arbitration Act 2011.

The Government is intending to support the implementation of the Code through a contribution to the costs of mediation services. Further details will be determined through consultation with stakeholders.

Code Administration Committee

The Bill provides for the establishment of the Code Administration Committee required under the Code.

The Code administration committee will monitor the implementation of the Code and provide advice on its operation.

The Code will be chaired by the Director of Consumer Affairs and Fair Trading and include members representing the interests of lessors, lessees and small business.

Regulations

The Bill provides regulation making powers to support the administration and implementation of the Act.

This includes regulations to modify certain definitions and support the rent related provisions. The purpose of the regulation making powers in the Bill is in recognition of the complexity of the subject matter and the need to be able to adapt where needed for the efficient operation of the Code.

Any regulation made under the Act will be subject to the existing scrutiny processes that exist for regulations, including review by the Subordinate Legislation Committee.

Consultation

I would now like to turn to consultation on the Bill.

On 24 April 2020, a working consultation draft of the Bill was provided to property and small business stakeholders. The purpose of this draft was to ensure that the Code, as legislated, would work effectively.

The feedback provided on the working draft was useful and has led to a number of changes to the Bill, including:

- ensuring parity between landlords and tenants with regard to the negotiating provisions;
- expanding to landlords protections for breach of lease from complying with COVID-19 laws;
- simplifying the interpretation provisions regarding protected leases and protected lessees;
- allowing certain prohibited lessor actions taken prior to commencement to continue if they can be taken during the financial hardship period; and
- removing certain technical aspects from the Bill, to be included in regulations to be nationally consistent where possible and appropriate.

Since the time in which the working draft was finalised, New South Wales has made regulations and Victoria has passed legislation to implement the Code. To ensure jurisdictional consistency and noting that some landlords and commercial tenants operate across State borders, the Bill has been adapted to include common approaches are taken where this is appropriate.

I commend the Bill to the House.

