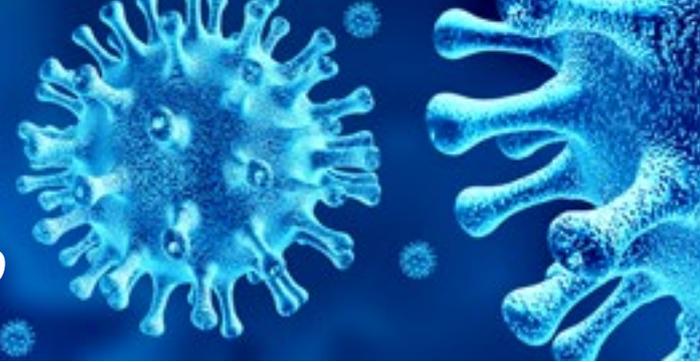


RESIDENTIAL TENANCIES (COVID-19 RESPONSE) ACT 2020



FREQUENTLY ASKED QUESTIONS

21 APRIL 2020

The *Residential Tenancies (COVID-19 Response) Bill 2020* is legislation that has passed through the Western Australian Parliament. When proclaimed, the legislation will be known as the *Residential Tenancies (COVID-19 Response) Act 2020*. For the purpose of this document, we will refer to it as the *COVID-19 Act*.

The *COVID-19 Act* will regulate, modify and provide the manner in which disputes will be dealt with, and will modify the *Residential Tenancies Act 1987* during the coronavirus (COVID-19) pandemic.

The *COVID-19 Act* will be repealed 12 months after the emergency period ends- currently 30 September 2020.

The Australian Government and the State Government see advantages in the lessor and the tenant coming together to discuss rent and, in particular, what will happen to any unpaid rent during the emergency period.

If the parties to the lease are unable to agree upon a *rent repayment agreement* then an aggrieved party can make a submission to the Commissioner for Fair Trading and through a conciliation conference, attempts will be made to agree upon a rent repayment agreement.

A rent repayment agreement will provide some comfort in that there is clear agreement as to the repayment of any debt arising during the emergency period. Also, it appears that having a rent repayment agreement without the need for conciliation will also provide a timely path to terminate the lease on the day following the emergency period, if the tenant is in default of the rent repayment agreement.

It appears that if conciliation is required then a rent default notice cannot be issued until three months after the expiry of the emergency period.

REIWA is providing its interpretation of answers to questions that have arisen. For the purposes of these FAQs we will assume that the *Bill* will be passed in the same format that that is being debated in Parliament. Where for example [s8] appears in an answer, then this refers to the relevant section of the *COVID-19 Act* that addresses this scenario.

Over time, REIWA will answer any further questions and update these FAQs.

Background information

Which tenancies does the COVID-19 Act apply?

The provisions apply to all residential tenancies in Western Australia.

From what date does the COVID-19 Act apply?

A little complicated, but essentially from 30 March 2020 [s2].

When do the provisions of the COVID-19 Act stop?

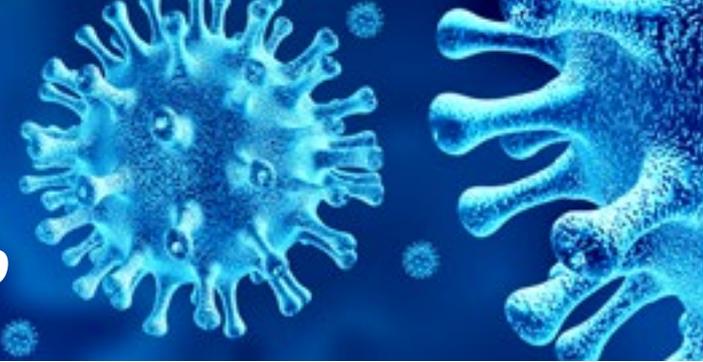
The provisions of the *COVID-19 Act* currently have a termination date of 30 September 2020 [s4(b)].

It is possible that the emergency period can be extended.

What is the emergency period?

This is the period from when the provisions of the *COVID-19 Act* start until they stop- currently 30 September 2020 [s4(b)].

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Moratorium on evictions

What is the moratorium on evictions/terminations by the lessor?

The *COVID-19 Act* attempts to limit the reasons why a tenancy can be terminated [s17].

What about tenants or households that are not affected by the COVID-19 pandemic?

Yes, Yes, there is an exception for a situation where the tenant's failure to pay rent is not due to financial hardship caused by the economic effects of the COVID-19.

If the rent is unpaid, the lessor may serve a remedial notice whereby the tenant has 60 days to pay the rent and to enter into a rent repayment agreement. In this scenario, a court (after a submission is approved by the Commissioner) can order that the termination of the tenancy take effect during the emergency period. [s18.A]

Are there any other exceptions to the moratorium?

Yes there are exceptions, which include:

1. the family and domestic violence provisions remain in place [s18];
2. applications to the Magistrates Court can be made under section 73 of the RTA if the tenant has or is likely to cause serious damage to the premises, or cause injury to the lessor, or property manager, or cause injury to any person in occupation or in an adjacent property;
3. the lessor can apply to the Magistrates Court seeking a termination on the grounds that the lessor would suffer undue hardship if the termination is not granted; and
4. if the premises are destroyed or rendered uninhabitable or cease to be lawfully usable as a residence [s32].

Is it a person or a household that cannot be evicted?

It is the tenancy that cannot be terminated.

What happens if the lessor seeks to recover possession?

There is a \$20,000 penalty unless:

- the lessor has the right to enter or re-enter; or
- the lessor has a court order to recover possession [s25].

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Mortgagee possession during COVID-19.

What if a mortgagee takes possession of the premises during the emergency period?

The tenancy continues and the mortgagee becomes the lessor.

A real estate agent would have the ability to enter into a management agreement with the mortgagee.

The tenancy can be terminated by the mortgagee on the day after the end of the emergency period [s69(2)].

How is person or household deemed to be suffering financial hardship as a result of COVID-19?

The *COVID-19 Act* does not define financial hardship but rather if during a conciliation, a person claims financial hardship caused by the economic effects of the COVID-19 pandemic, the Commissioner may require the person to provide details of financial hardship or give the Commissioner a statutory declaration setting out the details of the financial hardship. [54.A]

Break-lease policies during COVID-19

Can the tenant terminate the tenancy?

Yes, the tenant during the emergency period can terminate the tenancy agreement:

- If the tenant is suffering financial hardship [s19(2)]
- Under the current provisions of the family and domestic violence provisions of the RTA [s18]
- If a periodic tenancy, then by providing 21 days' notice [19(1)(a)(i)],
- If a fixed term tenancy agreement, then by giving a notice of termination not less than 21 days before the day on which the agreement is to terminate [19.(1)(b)]

Rent-reductions, waivers and repayments due to financial hardship

What is the process if the tenant seeks a reduction in rent?

The *COVID-19 Act* does not set out a process. There is an inference that the parties will discuss and try to come to an agreement.

What does the tenant have to show to confirm financial hardship?

Presently there is not any obligation for the tenant to show any documentation.

However, if the tenant is seeking to reduce the rent, then it would be reasonable that the tenant would produce some type of proof. DMIRS has not disputed that the tenant should produce documents.

Does the lessor have to engage in discussions to reduce the rent?

No, but the Minister for Commerce has said that there is an expectation that discussions will take place.

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Can the lessor and tenant come to a new rent agreement for the emergency period? Also, what is the rent repayment agreement?

Yes, the new agreement is referred to in the *COVID-19 Act* as a rent repayment agreement [s26(1)].

The rent repayment agreement sets out (whether in writing or not):

- about rent not paid in the underlying tenancy agreement that was entered into prior to the emergency period; and
- about how part or all of the rent not paid will be paid to the lessor.

What is the advantage of entering into a rent repayment agreement?

The advantage is that the lessor can give a rent default notice in relation to the tenant not paying the rent during the emergency period [s14(3)(a)].

The termination of the tenancy could then take effect on the day following the termination date of the emergency period.

Are there any requirements to waive any rent?

No, there are not any requirements to waive any rent.

Can the lessor agree to defer rental payments?

Yes, where deferral means that the agreed rent remains payable, but the timing of the payment has been deferred.

What about rent increases?

Rent payable for all tenancies (whether the tenant is affected by COVID-19 or not) cannot be increased during the emergency period [s8(2)].

What happens to rent reviews that have been agreed to prior to the emergency period and come into effect during the emergency period?

The tenant cannot be required to pay the increased rent until the day after the end of the emergency period—currently 1 October 2020 [s8(4)].

What about rent increases that are due to take effect during the emergency period?

The tenant will not be required to pay the increased rent until the day after the end of the emergency period—currently 1 October 2020 [s8(4)].

Can the parties initially agree to a rent decrease and a subsequent increase during the emergency period?

Yes, providing the parties agree and the agreed new rent, after the increase, is not greater than the amount of rent payable before the agreement to reduce the rent [s8(5)].

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By way of example, say the rent on the residential tenancy agreement is \$360 per week and during the emergency period the lessor and tenant agree to lower the rent to \$300 per week. The lessor and the tenant during the emergency period can agree to increase the rent to an amount not exceeding \$360 per week.

The rent may increase without any requirement of a notice period [s8(6)].

Serving notices during COVID-19

Can a lessor serve a rent default notice if a rent repayment agreement is in place?

Yes, if the tenant fails to pay rent according to the rent repayment agreement, then the lessor can serve a rent default notice [s14(3)(a)].

Can a lessor serve a rent default notice if there is not a rent repayment agreement?

No, a rent default notice can only be given if there is a rent repayment agreement in place and the tenant defaults on that agreement [s14(3)(a)].

In this scenario (where there is no rent repayment agreement), what happens if the tenant fails to pay the rent during the emergency period?

The lessor is forced into a long process and cannot give a rent default notice until the day that is three months after the end of the emergency period [s14(7)].

The long process is addressed in section 14(5) of the *COVID-19 Act* and requires the lessor to make a submission to the Commissioner where conciliation will be attempted to bring about a rent repayment agreement.

However, if the Commissioner certifies that no rent reduction agreement has been reached or certifies that the lessor has not cooperated during the with the conciliation proceedings, then the lessor cannot give a rent default notice. The effect of this is that the lessor will have to wait until the termination of the emergency period before any termination process can be initiated.

What is the difference between section 14 and section 26 of the COVID-19 Act?

Section 14 refers tenancy agreements that come under the RTA and the *Residential Parks (Long-stay Tenants) Act 2006*.

Section 26 refers to tenancy agreements that would come about through boarding and lodging.

Dispute resolution

What happens if the lessor and tenant cannot come to an agreement?

The lessor and tenant retain the right to seek relief from the court under section 15 of the *RTA*.

However, the *COVID-19 Act* places an obligation upon the parties to the dispute to submit the dispute for mandatory conciliation prior to going to the Magistrates Court [s47].

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What is mandatory conciliation?

Where agreement cannot be reached, either party can apply to the Commissioner who must either dismiss the submission or accept the submission and then conduct a conciliation [s51(1)].

In making a decision to dismiss or accept the submission, the Commissioner may require any of the parties to supply and verify any details [s52(1)].

The Commissioner also has the ability to make any inquiries that are considered appropriate [s51(2)].

What is the conciliation process?

The Commissioner's function is to communicate with the parties, arrange for conferences, facilitate in and manage those conferences, and give advice and recommendations. [s53(2)].

The Commissioner can direct that a particular person must attend that conciliation conference [s54] and the penalty for not following a direction is \$5,000.

Conciliation can be conducted in any manner directed by the Commissioner; including in person, telephone link, and video conference [s53(2)(b)].

Representation of the tenant and the lessor at these conferences is the same as before a Magistrate [s55].

Where the parties come to an agreement and the parties' consent, the Commissioner must give effect to the agreement by order that is final and binding [s57].

Who will conduct the conciliation process?

The Commissioner may refer any power or duty to a person employed in the department of the Public Service [s60].

What happens if the conciliation fails?

While the Commissioner will encourage the parties to reach an agreement, the Commissioner does not have any power to make an order that the parties must follow.

If there is not an agreement reached in conciliation the Commissioner must certify that no agreement has been reached and can also certify that a party has not cooperated with the conciliation proceedings [s56].

If the conciliation fails, then can an application be made to the Magistrate's Court?

Yes, where the Commissioner has certified that no agreement has been reached a person may make an application to the court [s47(2)(b)].

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Fixed-term tenancies

What happens to a fixed term lease that has a termination date that is during the emergency period?

The lessor cannot terminate the lease.

The tenant may decide to not extend or renew i.e. terminate and provide vacant possession.

The tenant and lessor may agree to enter into a new lease agreement or extend the term of the lease on the same terms that applied immediately prior to the expiry day, but the rent cannot increase.

If an agreement cannot be reached the tenant may remain in the tenancy on a periodic tenancy agreement on the same terms that applied immediately prior to the expiry day, but the rent cannot be increased. In such a scenario the lessor could at the end of the emergency period terminate the periodic tenancy in the normal way as provided for in the *RTA*.

Can lessors take termination and vacant possession applications direct to the Magistrates Court for hearing?

This is not clear, and it is assumed that a submission must be made to the Commissioner.

What happens to the outstanding rent at the end of the emergency period?

It remains a debt owing by the tenants.

If a rent repayment agreement was entered into, then the terms of that agreement should address how the debt will be repaid.

What if some tenants have continued paying their 'share' and other tenants have not?

If the tenants are unable to resolve their concerns, then the tenants have the right to apply to the Magistrates Court seeking an order.

Until an order is in place, the debt remains on all tenants.

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Entry to a premise during COVID-19

What has happened regarding a lessor's right of entry to various tenancies affected or not affected by COVID-19?

The *COVID-19 Act* is silent on matters relating to entry by the lessor. It can only be assumed that the provisions of the *RTA* remain in force and any direction issued under the *Emergency Management Act 2005* or the *Public Health Act 2016*.

Tenancy database entries during COVID-19

How has the recording of information on residential tenancy database been affected?

The *COVID-19 Act* has amended section 82E of the *RTA* so that failures to pay rent due to financial hardship caused by the effects of the COVID-19 pandemic during the emergency period cannot be recorded on a residential tenancy database. This also applies to other matters relating to the effects of the COVID-19 pandemic [s75].

Maintenance and repairs during COVID-19

What happens to repairs and maintenance during the emergency period?

The lessor is not under any obligation to attend to any maintenance of a routine nature if the lessor is suffering financial hardship caused by the economic effects of the COVID-19 pandemic, or there is an inability to access the premises due to a direction under the *Emergency Management Act 2005* or the *Public Health Act 2016* [s11(2)].

What happens to repairs that are deemed urgent under the RTA?

The *COVID-19 Act* has not addressed this scenario, so the provisions of the *RTA* remain relevant.

Transitional matters

What about transitional matters- things that have happened prior to 30 March 2020 but do not take effect until during the emergency period?

Termination notices given before 30 March 2020 that have a specified day during the emergency period will have effect and the agreement may be terminated despite the *COVID-19 Act* [s65]

If during the pre-assent period, if vacant possession has been given to the lessor or a court orders termination of the tenancy, then the *COVID-19 Act* does not apply [s66].

If a lessor or tenant terminates a tenancy agreement during the pre-assent emergency period, the *COVID-19 Act* does not apply.



Landlord insurance

How will landlord insurance policies react to claims?

REIWA is currently liaising with insurers to determine how they will react to the provisions that will be enacted.

For example, if the tenant is paying no rent and cannot be evicted, then will the policy support a claim.

Also, whether an agreed deferment of rent will be supported. It is worthy to note that if deferments are supported then the landlord probably will not be able to receive an insurance payout until after the expiry of the emergency period.

REIWA will provide clarification as it becomes available.